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UNDERHILL'S
LAW OF TORTS.

FOURTH EDITION.

BY THE SAME AUTHOR.

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A Practical and Concise Manual
OF THE LAW RELATING TO
PRIVATE TRUSTS AND TRUSTEES.

Second Edition, Enlarged and Revised.

A SUMMARY
OF THE
LAW OF TORTS;

OR,
WRONGS INDEPENDENT OF CONTRACT.

BY
ARTHUR UNDERHILL, M.A., LL.D.,
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*Author of "A Concise Treatise on the Law relating to Private
Trusts and Trustees," &c.*

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TO MY COUSIN,

JOSEPH UNDERHILL, Esq.,

One of Her Majesty's Counsel,

AND

*A Master of the Bench of the Honorable Society
of the Middle Temple,*

This Work

IS,

WITH FEELINGS OF THE HIGHEST RESPECT,

AFFECTIONATELY DEDICATED.

PREFACE

TO

THE FOURTH EDITION.

THE fact that three Editions, constituting 3,500 copies, of this Work have been sold, and that an American firm have thought it worth their while to issue an unauthorized edition in the United States, renders it no longer necessary to apologize for its existence.

Many of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law; and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text-book separating *principle* from *illustration*, that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

Indeed, however useful the great treatises are for the practitioner (and to him they are invaluable), they are almost useless to the student. In the first place, to his unaccustomed mind they present a mere chaos of examples, for the most part unexplained, and, in the absence of explanation, seeming very often in direct contradiction. What student without careful explanation would grasp the difference between *Fletcher v. Rylands* and *Nichols v. Marsland* for instance?

In the second place, the men are few indeed who can trust to their memories to retain the contents of a large treatise with accuracy; and although that is not necessary, yet it is essential that they should accurately remember the *principles* of the law.

For these and other reasons, I am led to the belief that if a student will *thoroughly master* this work and the companion volume (written on the same plan) by my friend and former pupil, Mr. Claude C. M. Plumptre, of the Common Law Bar, he will know as much of the *principles* of the Common Law as will suffice to make him a competent general practitioner, and to pass him through his examinations.

I do not assert for one instant that it will enable him to answer every case that comes before him, but I am not acquainted with any man whose mental stock enables him to do this. In the vast majority of cases

the practitioner who has any regard for his own reputation will turn to his digests and his reports; for, however well he may understand the principles of the law, it is only very long practice indeed, or the intuition of genius, which enables him to apply these principles to particular complicated facts with ease and certainty.

In this Edition I have inserted some American and Colonial decisions, which seemed to me to be both good law and excellent illustrations of principles.

To the student who reads this Work, my advice is, to learn the *rules* thoroughly, and to read in the reports all such of the cases referred to in the text as he may feel any difficulty in understanding.

It only remains to render most grateful thanks to my friend, and pupil, Mr. Carleton Rea, B.A., of Lincoln's Inn, Barrister-at-Law, who has kindly assisted me in the revision of this Edition, and in seeing it through the press, a work requiring much care and patience.

ARTHUR UNDERHILL.

1, OLD SQUARE, LINCOLN'S INN, W.C.

June, 1884.

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PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

OF INJURIES PURELY EX DELICTO.

The Object of Law. “The maxims of law,” says Justinian, “are these: to live honestly, to hurt no man, and to give every one his due.” The practical object of jurisprudence must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and ensuring to every member of the community the full enjoyment of his rights and possessions.

Public and Private Injuries. Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private injuries. The former—commonly called crimes—consist of such offences as, aiming at the root of society and order, are considered to be injuries to the community at large; and as no redress can be given to the community, except by the prevention of such acts for the future, they are visited with some deterrent and exemplary punishment.

Private or civil injuries, on the other hand, are such violations or deprivations of the legal rights of another, as are accompanied by either actual or

presumptive damage. These being merely injuries to private individuals, admit of redress. The law therefore affords a remedy, by forcing the wrongdoer to make reparation.

Division of Private Injuries. But as injuries are divided into criminal and civil, so the latter are subdivided into two classes of injuries *ex contractu* (which, perhaps, may be said to include breaches of trust, trusts being considered as *quasi* contracts) and injuries *ex delicto*; the former being such as arise out of the violation of private contracts; the latter, commonly called torts, such as spring from infractions of the great social obligation, by which each member of the state is bound to do hurt to no man.

It is of the latter class that I am about to treat in this work.

Definition of a Tort. A tort is described in the Common Law Procedure Act, 1852, as “a wrong independent of contract;” but this does not convey any very clear idea of the nature of it. I shall not, however, attempt to define what a tort is, but shall content myself with the less scientific but more intelligible method of describing it as follows:—

RULE 1.—A person commits a tort, and renders himself liable to an action for damages, who (independent of any contract) commits some act not authorized by law, or omits to do something which he ought to do

by law, and by such act or omission either infringes some absolute right, to the uninterrupted enjoyment of which another is entitled, or causes to such other some substantial loss of money, health, or material comfort, beyond that suffered by the rest of the public.

It will be perceived that two distinct factors go to make a tort, viz. (1) a wrongful act or omission independent of contract (see *Pryce v. Belcher*, 4 C. B. 866); and (2) either a consequent invasion of another's right (see *Ashby v. White*, 1 Sm. L. C. 284), or the consequent infliction upon him of some loss (see *Iveson v. Moore*, 1 Ld. Raym. 486). Neither of these two factors will, by itself, be sufficient to sustain an action for damages, although, as we shall see hereafter, the first may, under certain circumstances, be alone sufficient to sustain an action for an injunction.

An invasion of a right, or the infliction of damage, unconnected with a wrongful act, is technically called a *damnum absque injuriâ*, the word *damnum* being used to signify the invasion of a right or the infliction of loss, and the word *injuria* being used to signify a wrongful act or omission, and it is a maxim that *ex damno absque injuriâ non oritur actio*. Thus, as will be seen further on, great loss and misery may be caused by an individual with impunity, so long as he is careful to avoid doing an unlawful act or making an unlawful omission.

It has been said, that although a *damnum absque injuriâ* is no ground for an action for damages, yet there are certain cases in which an *injuria* is sufficient

without a *damnum*, or, as it has been expressed, *ex injuriâ sine damno oritur actio*. However, this latter maxim cannot be supported, unless we give very different meanings to *damnum* and *injuria* to those which they were used to signify in the first maxim. For it is certainly incorrect to say that a wrongful act or omission without loss or infringement of a private right will support an action. The sense in which the authors of *ex injuriâ sine damno oritur actio* used the word *injuria* was to signify a wrongful act or omission, *injuring a private person*, and they used *damnum* to mean only an actual loss. Used in these senses, the maxim is correct, but it is obvious that it is most misleading to use words in one sense in the first maxim, and in a different sense in the second, and therefore the student should bear in mind that the correlation of the two maxims is a mere literary quibble, and founded on a fallacy of ambiguity, and that throughout this work, the word *injuria* is used to signify a wrongful act or omission (*ex. gr.*, going without excuse on to another's land, or driving negligently, or causing a public nuisance), and that the word *damnum* is used to signify the invasion of a private right, however trivial, or the infliction of actual loss or damage. For the interruption of a right, however temporary and however slight, is considered by the law to be damaging, and a proper subject for reparation, and substantial damages have more than once (in cases of false imprisonment) been awarded, where the plaintiff's surroundings were very considerably improved during his unlawful detention. But where no private right (*ex. gr.* liberty) has been

invaded by a wrongful act, then no action will lie unless the plaintiff has sustained actual loss or damage.

The reason for all this is very clear. In the case of the invasion of a private right, there is a particular damage inflicted on the plaintiff, and that by means of a wrongful act, and therefore the defendant ought to make reparation. But where no private right is infringed, but merely an unlawful act or omission committed or made, there the grievance is one properly affecting the public and not any private individual in particular; and if every member of the public were allowed to bring actions in respect of it, there would be no limit to the number of actions which might be brought (*Winterbottom v. Lord Derby*, *L. R.*, 2 *Ex.* 316). The remedy of the public is by indictment if the unlawful act amounts to so serious a dereliction of duty as to constitute an injury to the public. But if, in addition to the injury to the public, a special, peculiar, and substantial damage is occasioned to an individual, then it is only just that he should have some private redress (see *Lyon v. Fishmongers' Co.*, *L. R.*, 1 *App. Ca.* 662; and *Fritz v. Hobson*, *L. R.*, 14 *Ch. D.* 542). Let us now glance at some illustrations of the foregoing rule:—

(1) If one trespasses upon another's land, that is the invasion of an absolute right; but if the trespass was committed in self-defence, in order to escape from some pressing danger, no action will lie in respect of it, because the law authorizes the commission of a trespass for such a purpose; and, therefore, although there was a *damnum*—namely, a private grievance, there was no *injuria* or wrongful act, and

the trespass was consequently a *damnum absque injuria* (37 Hen. 6, 37, pl. 26).

(2) Again, if I own a shop which greatly depends for its custom upon its attractive appearance, and a company erect a gasometer hiding it from the public, no action is maintainable by me; because, although my trade may be ruined by the obstruction, yet the gas company are only doing an act authorized by law, namely, building upon their own land (*Butt v. Imperial Gas Co.*, *L. R.*, 2 *Ch. App.* 158).

(3) A legally qualified voter duly tenders his vote to the returning officer, who wrongly refuses to register it. The candidate for whom the vote was tendered gains the seat, and no loss whatever, either in money, comfort, or health, is suffered by the rejected voter; yet his absolute right to vote at the election is infringed, and that by an unlawful act of the returning officer, and hence we have here an *injuria* and a *damnum* sufficient to support an action (*Ashby v. White*, 1 *Sm. L. C.* 251).

(4) A man erected an obstruction in a public way. The plaintiff was delayed on several occasions in passing along it, being obliged, in common with every one else who attempted to use the road, either to pursue his journey by a less direct road, or else to remove the obstruction. It was held, however, that he could not maintain an action, because although there had been an unlawful act on the part of the defendant, yet there was no invasion of an absolute private right, and no substantial damage peculiar to the plaintiff beyond that suffered by the rest of the public (*Winterbottom v. Lord Derby*, *L. R.*, 2 *Ex.* 316).

(5) The defendants left an unfenced hole upon premises of theirs adjoining a highway. The plaintiff, in passing along the highway at night, fell into the hole, and was injured. Here the plaintiff clearly suffered a special and substantial damage beyond that suffered by the rest of the public, and accordingly he recovered damages (*Hadley v. Taylor*, *L. R.*, 1 *C. P.* 53).

(6) The plaintiff kept a coffee-house in a narrow street. The defendants were auctioneers, carrying on an extensive business in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from their vans. The vans intercepted the light from the plaintiff's coffee-house to such an extent, that he was obliged to burn gas nearly all day, and access to his shop was obstructed, and the smell from the horses' manure made the house uncomfortable. Here there was a state of facts constituting a public nuisance, but there was also a direct and substantial private and particular damage to the plaintiff, beyond that suffered by the rest of the public, so as to entitle him to maintain an action (*Benjamin v. Storr*, *L. R.*, 9 *C. P.* 400; and see also *White v. Hindley Local Board*, *L. R.*, 10 *Q. B.* 219).

(7) To give one more example similar to the last; where a defendant, in the course of building operations in a London street, greatly and unreasonably blocked up a highway, so that customers could not reach the plaintiff's shop, it was held that the plaintiff was entitled to damages for loss of cus-

tomers, on the ground that he had suffered a *particular* injury from a public nuisance, over and above the injury which the public generally had suffered (*Fritz v. Hobson*, *L. R.*, 14 *Ch. D.* 542; and see also *Harris v. Mobbs*, *L. R.*, 3 *Ex. D.* 268).

Where Loss would have been suffered in any Event. It sometimes happens that a loss or damage may be attributed both to a wrongful act, and to some other distinct cause. In such cases the following rule applies:—

RULE 2.—Where a person has been guilty of a wrongful act or omission, and some damage ensues from it, which damage would also have ensued in any event owing to other circumstances, the person guilty of the wrongful act is not excused, but it is open to him to show if he can, that there is a substantial *and ascertainable* portion of the damages fairly to be attributed *solely* to the other circumstances, and in that case he is entitled to a proper deduction in that respect (see *Nitro-Phosphate Co. v. London and St. Katharine's Dock Co.*, *L. R.*, 9 *Ch. D.* 503).

Thus where it was the duty of the defendants to keep a river wall at a height of four feet two inches above Trinity high water mark, and they only kept it at a height of four feet, and an extraordinary tide rose four feet five inches, and flooded the plaintiffs'

works; it was held, that as the defendants had committed a breach of duty in not building their wall to the proper height, and that some damage having been suffered in consequence thereof, an action lay against them, although even if the wall had been of the required height the tide would still have overflowed it; James, L. J., saying:—"Suppose that the same damage would have been done by the excess of height of the tide if the wall had been of due height as has been done; yet if the damage has been done by reason of the wall not being of due height, the defendants are liable for that damage arising from that cause, and are not excused because they would not have been liable for similar damage if it had been the result solely of some other cause; and moreover, long before the tide rose even to four feet, it began to flow over towards and into the plaintiffs' works, and of course the defendants cannot escape their liability for the damage so occasioned, because the tide afterwards went on swelling and swelling, even if it could be shown that the same damage would have been occasioned by that additional height of water if the wall of the defendants had been in proper condition. They had been guilty of neglect, and had done damage before the extra height had been reached, and their liability to the plaintiffs was complete when the damage was done. . . . No doubt if the Court can see on the whole evidence [as they could not see in that case] that there was a substantial and ascertainable portion of the damage, fairly to be attributed *solely to the excess of the tide above the proper height which it was the duty of the defendants to*

maintain, occurring after the excess had occurred, and which would have happened if the defendants had done their duty, then there ought to be a proper deduction in that respect” (*Nitro-Phosphate Co. v. London and St. Katharine’s Dock Co.*, *L. R.*, 9 *Ch. D.* 526 ; and see also *Clark v. Chambers*, *L. R.*, 3 *Q. B. D.* 327, and *Harris v. Mobbs*, *L. R.*, 3 *Ex. D.* 268).

Of Injuriae, or Wrongful Acts. In the words of Pratt, C. J., “torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief” (see *Chapman v. Pickersgill*, 2 *Wils.* 146). It is, therefore, hopeless to attempt any definition of what constitutes a wrongful act or *injuria*, upon which an action for tort may be founded ; but, broadly speaking, the following rule may, perhaps, give the student some standard by which to measure particular cases :

RULE 3.—A man is guilty of an *injuria* who, without authority or excuse, either—

- (a) Wittingly or unwittingly, without excuse, does any act, or makes any written or verbal statement, which infringes upon any absolute right of another person ;
- (b) Wittingly or unwittingly does any act which is forbidden by law, or omits to do or perform some duty which the law casts upon him ;

- (c) Omits to do something which a reasonable man would do, or does something which a reasonable man would not do ;
- (d) Makes any false statement, either written or verbal, to another, with intent to deceive ;
- (e) Omits to make any statement with intent to deceive in cases in which there is a legal duty upon him to make such statement.

Roughly speaking, therefore, *injuriæ* proceed either from misdeeds, neglects or frauds.

Involuntary Acts or Omissions. Where the act or omission not authorized by law is committed involuntarily, no action lies.

RULE 4.—No person is legally responsible for any act or omission not attributable to active or passive volition on his part.

I do not mean to say that a man who sins from ignorance, and not from malice, is thereby excused. Far from it, for by reasonable inquiry he might set himself right (see *Bascley v. Clarkson*, 3 *Lev.* 37); and, indeed, on grounds of public policy alone, apart from metaphysical considerations, it is obvious that it

would be highly inconvenient and dangerous to admit any such doctrine. The above rule, differently put, means, in the language of an ancient justice, that "no man shall be excused of a trespass, unless it be judged utterly without his fault."

(1) A horse driven by the defendant was alarmed by the noise caused by a butcher's cart driven furiously along the street, and, becoming ungovernable, ran away and injured the plaintiff's horse. It was, however, held, that as the act was involuntary on the defendant's part, he was not liable (*Wakeman v. Robinson*, 1 *Bing.* 213; *Manzoni v. Douglas*, *L. R.*, 6 *Q. B. D.* 145, and *Tillett v. Ward*, *L. R.*, 10 *Q. B. D.* 17).

(2) Under the Metropolis Local Management Act (18 & 19 Vict. c. 120), a duty is imposed upon the vestry, of properly cleansing the sewers vested in them. Under the premises of the plaintiff was an old drain, which was one of the sewers vested in the vestry. This drain having become choked, the soil therefrom flowed into the cellars of the plaintiff and did damage. In an action against the vestry, the jury found (*inter alia*) that the obstruction was unknown to the defendants, and could not by the exercise of reasonable care have been known to them. Held, that upon this finding the defendants were entitled to the verdict (*Hammond v. Vestry of St. Pancras*, *L. R.*, 9 *C. P.* 316, and see also *Losee v. Buchanan*, 51 *New York Rep.* 476, in relation to the liability of the owner of a steam boiler).

(3) It is a rule of law, that where one brings on to his property for his own purposes, and collects and

keeps there, any substance likely to do injury to his neighbour if it escapes, he must keep it at his peril. Yet where the escape could not have been prevented by any possible means, he will not be liable, as will be seen from the well-known case of *Nichols v. Marsland* (*L. R.*, 10 *Ex.* 255, and on appeal, *L. R.*, 2 *Ex. D.* 1). The facts there were as follows:—On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream which rose above the defendant's land, and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An *extraordinary* rainfall caused the stream and the water in the pools to swell, so that the artificial embankment was carried away by the pressure, and the water in the pools being suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall was most excessive, and amounted to a *vis major* or visitation of God. Under these circumstances, it was held that no action was maintainable, because, as Bramwell, B., said, "the defendant had done nothing wrong; he had infringed no right. It was not the defendant who let loose the water and sent it to destroy the bridges. He did, indeed, store it, and stored it in such quantities that if it were let loose it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable?"

If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier would be liable; but that cannot be. Then why is the defendant liable, if some agent over which he has no control lets the water out? The defendant merely brought the water to a place, whence another agent let it loose, *but the act is that of an agent he cannot control*" (see also *Nitro-Phosphate Co. v. London and St. Katharine's Dock Co.*, *L. R.*, 9 *Ch. D.* 503).

(4) And so again where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable; Kelly, C. B., saying:—"It seems to me to be immaterial whether this is called a *vis major* or the unlawful act of a stranger; it is sufficient to say that the defendant had no means of preventing the occurrence" (*Bor v. Jubb*, *L. R.*, 4 *Ex. D.* 77).

(5) The above cases must be carefully distinguished from the well-known leading case of *Rylands v. Fletcher* (*L. R.*, 3 *H. L.* 330), the facts of which were as follows:—The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and *employed competent persons* to construct it, so that there was no question of negligence. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts,

communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir, it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. It was contended on behalf of the defendant that there was no negligence on his part, and that if he were held liable, it would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously, whereas he contended that knowledge of possible mischief was of the very essence of the liability incurred by occasioning it. The House of Lords, however, held the defendant to be liable on the ground that "a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *primâ facie* responsible for all the damage which is the natural consequence of its escape." It therefore appears that the act which was not authorized by law was *the allowing the water to escape*, and whether this was the result of negligence, or whether it was the *result of a latent and undiscovered defect in the engineering works*, was quite immaterial. The escape of the water was caused by something of which the defendant was *ignorant*, not by something altogether beyond his control or volition, like a visitation of Providence or the act of a third party, as Mellish, L. J., said in *Nichols v. Marsland* (L. R., 2 Ex. D. 5), "if indeed

the damages were caused by the act of the party *without more*—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes, and does damage to his neighbour—the case of *Rylands v. Fletcher* establishes that he must be held liable.” But where there is *something more*—either the act of God or of a third party—which is the proximate cause of the damage, then *Rylands v. Fletcher* has no application. This of course, however, presupposes that the damage has been *solely* caused by the act of God or of a third party, and that the defendant has not contributed to it by *some distinct breach of duty* (as in *The Nitro-Phosphate Co. v. London and St. Katharine’s Dock Co.* cited above), for in such a case the defendant will not be excused, but his conduct will fall under Rule 2 (*Harris v. Mobbs*, *L. R.*, 3 *Ex. D.* 268; *Clark v. Chambers*, *L. R.*, 3 *Q. B. D.* 327).

The distinction between *Rylands v. Fletcher* on the one hand, and *Nichols v. Marsland* and *Bor v. Jubb* on the other, is no doubt subtle and difficult for the lay mind to grasp; but it shortly comes to this, that a man is not liable for the acts of God or a third party, unless (1) he has committed some distinct breach of duty, or (2) where he has taken upon himself to construct a dangerous work, and such work is in fact defective, whether owing to the constructor’s negligence or not; for having taken upon himself to make it, he must be taken to guarantee that it is fit for the purpose for which it is made (see also *Hardman v. N. E. R. Co.*, *L. R.*, 3 *C. P. D.* 168, and *Fletcher v. Smith*, *L. R.*, 2 *App. Ca.* 781).

Sub-rule.—The law presumes that an act or omission done or neglected under the influence of pressing danger, and which was necessary in order to escape that danger, was done or neglected involuntarily.

This doctrine would seem to be founded upon the maxim that self-preservation is the first law of nature, and that where it is a question whether one of two men shall suffer, each is justified in doing the best that he can for himself. Indeed, so far has this doctrine been carried, that it is said, that if two shipwrecked persons are attempting to save themselves by means of a plank which is not sufficiently large to sustain them both, one of them is justified in pushing the other off. This however is an example rather appertaining to criminal than civil law.

(1) A person wrongfully threw a squib on to a stall, the keeper of which, in self-defence, threw it off again; it then alighted on another stall, was again thrown away, and, finally exploding, blinded the plaintiff. The liability of the persons who threw it away from their stalls in self-defence, was not the question before the court, but a dictum of Chief Justice De Grey is a good illustration of the sub-rule. He said, "It has been urged, that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*Scott v. Shepherd*, 2 W. Bl. 894). The first example of the first rule (*supra*) is another example of the above sub-rule.

Unintentional Injuries. Although, as we have seen, no act or omission can be said to be wrongful unless it is within the power of the person doing or omitting, to abstain from doing or omitting to do it, and although, therefore, every wrongful act must in a certain sense be either actively or passively intentional, yet it is no defence to an action that the wrongdoer did not intend to cause any *damage*.

RULE 5.—Every person is presumed to intend the probable consequence of every voluntary act or omission of his, not authorized by law.

Of course an intention to inflict an injury makes a tort very much more serious from a moral point of view, and, as we shall see hereafter, is an important factor in assessing the amount of damages to be awarded to the injured party; but nevertheless actual intention is not a necessary ingredient, being always irrebutably presumed.

(1) In the above-mentioned case of *Scott v. Shepherd*, the person who first started the squib was held liable for the loss of the plaintiff's eye, although it was proximately caused by the last person who removed it from his stall.

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt

(*Indermaur v. Dames*, *L. R.*, 2 *C. P.* 311; *White v. France*, *L. R.*, 2 *C. P. D.* 308).

(3) The defendants, a burial board, planted on their own land, and about four feet distant from their boundary railings, a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow which was hired by the plaintiff for pasture. The plaintiff's horse, feeding in the meadow, ate of that portion of the tree which projected, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants:—*Held*, that the defendants were liable (*Crouchurst v. Amersham Burial Board*, *L. R.*, 4 *Ex. D.* 5; and see *Lac v. Corp. of Darlington*, *L. R.*, 5 *Ex. D.* 28).

Remoteness of Damage. The rule, however, is subject to the following qualification:—

Sub-rule.—*No action lies where the injuria and damnum are not usually found in sequence, unless it be shown that the defendant knew, or had reasonable means of knowing, that consequences, not usually resulting from the act, were, by reason of some existing cause, likely to intervene so as to cause damage to a third person.*

(1) The defendant, in breach of the Police Act (2 & 3 *Vict. c.* 47, s. 54), washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather the grating was

obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. In giving judgment in an action brought in respect of this damage, Chief Justice Bovill said: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom;" but "where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. If the drain had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to anyone. Can it then be said to have been the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance? I think not. There was no distinct evidence to show the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had a right, then, to expect that the water would flow down the gutter to the sewer in the ordinary course, and, but for the stoppage (for which the defendant is not responsible), no damage would have been done." And accordingly judgment was given in favour of

the defendant (*Sharp v. Powell, L. R., 7 C. P. 258*).

(2) But where water, which had trickled down from a waste-pipe at a railway station on to the platform, had become frozen, and the plaintiff, a passenger, stepped upon it and fell and was injured, the court held the defendants liable, on the ground, probably, that the non-removal of a *dangerous nuisance*, like ice, from their premises, was the proximate cause of the injury (*Shepherd v. Mid. R. Co., cited by plaintiff arguendo; Sharp v. Powell, supra*).

(3) Again, a brig, by the negligence of those on board her, came into collision with a barque. In the collision the main rigging of the barque was carried away, and shortly afterwards her fore and main masts went by the board. Towards evening of the same day the wind increased in violence, and eventually the barque was driven on shore, and some of the crew were drowned. It was held, that, as the loss of the masts was the proximate cause of the wreck, and as the loss of the masts was the immediate result of the collision, the loss of life was the result of the collision (*The George and Richard, L. R., 3 A. & E. 466*).

Statutory Rights and Duties. RULE 6.

-When a statute gives a *right*, or *creates a duty*, in favour of an individual or class of individuals, then, where no penalty is attached, any infringement of the right or breach

duty be a tort remediable in the ordinary way (*Dormont v. Furness R. Co.*, *L. R.*, 11 *Q. B. D.* 496). But where a penalty is attached (whether recoverable by the party aggrieved or not), it then becomes a question whether it was the intention of the legislature, in making the particular statute, that the penalty should be the only satisfaction, or whether, in addition, the party injured should be entitled to sue for damages; and in the case of a private act imposing an active duty, the penalty will *primâ facie* be taken to be the only remedy given for breach of the duty (see and consider judgments in *Atkinson v. Newcastle Water Co.*, *L. R.*, 2 *Ex. D.* (*C. A.*) 444).

(1) By act of parliament 26 & 27 Vict. c. lxxxix. the harbour of B. was vested in the defendants, and its limits were defined. The defendants had however jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, *inter alia*, buoying "the said harbour and channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. cxlvi. a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed, were to be paid to the defendants and to be applied by them in, *inter alia*, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which

under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially, remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—*Held*, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel, or to mark its position by buoys, and that not having done so they were liable in damages to the plaintiff (*Dormont v. Furness Railway Co., L. R., 11 Q. B. D. 496*).

(2) At one time it was generally considered, that when a statute gave a right or created a duty in favour of an individual or class, then, unless it enforced the duty by a penalty recoverable *by the party aggrieved* (as distinguished from a common informer), any infringement of such right, or breach of such duty, would, if coupled with actual damage, be a tort remediable in the ordinary way. This notion was founded upon the judgment in the case of *Couch v. Steel* (3 E. & B. 402), but is no longer a correct statement of the law. Thus, water companies are by act of parliament obliged to keep their pipes, to which fire plugs are attached, constantly charged with water at a certain pressure, and are to allow all persons, at all times, to use the same for extinguishing fire without compensation; and for neglect of this duty a penalty is imposed, recoverable *by a common informer*. On a demurrer to a declaration by which the plaintiff claimed damages against a water company for not keeping their pipes charged as required, whereby his premises were burnt down, it was held by the Court of Appeal that the action

would not lie, Lord Cairns, L. C., saying :—" Apart from authority, I should say without hesitation that it was no part of the scheme of this act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action, but that its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and where convenient to give the penalties, or some of them, to the persons injured, but, where not convenient so to do, then simply to impose public penalties, not by way of compensation but as a security for the due performance of the duty. To split up the 43rd section, and to say *that in those cases in which a penalty is to go into the pocket of the individual injured there is to be no right of action, but that where no penalty is so given to the individual there is to be a right of action, is to violate the ordinary rules of construction.*" His lordship then referred to *Couch v. Steel*, and continued, " I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down, that wherever a statutory duty is created, any person, who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that *that must to a great extent depend on the purview of the legislature in the particular statute, and the language which they have there employed, and*

more especially when, as here, the act with which the court have to deal is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers, as to the manner in which they will keep up certain public works." The late Chief Justice Cockburn also said: "I am of the same opinion. Notwithstanding the great respect that I entertain for the judges who decided the case of *Couch v. Steel*, I must say that I fully concur with the Lord Chancellor in thinking that the question, whether that case was rightly decided, is open to very grave doubts. That question, however, is one which it is unnecessary to entertain here, for the present case is clearly distinguishable. The act on which that case turned was a public general act applicable to all the Queen's subjects; here we are dealing with certain obligations imposed by the legislature upon a private company, as the conditions upon which parliament granted them the powers under which they carried out their undertaking, and I think that such an act of parliament as this is liable to a much more limited and strict interpretation than that which can be put upon one which is applicable to all the subjects of the realm." Lord Justice Brett concurred, and said: "It is unnecessary to determine here whether *Couch v. Steel* was properly decided upon the particular act under which the action in that case was brought; I am, however, bound to say that I entertain the strongest doubt whether the broad rule there enunciated can be maintained,—the rule, that is to say, that where a new duty is created by statute and a penalty is imposed for its breach,

which penalty is to go to the person injured by such breach, the penalty, however small and inadequate a compensation it may be, is in such a case to be regarded as indicating an intention on the part of the legislature that there should be no action by such person for damages, but that, where a similar duty is created, and a similar penalty imposed which is not to go to the person injured, then the intention is that he is to have a right of action. I do not think that that proposition can be supported" (*Atkinson v. Newcastle Water Co.*, *L. R.*, 2 *Ex. D.* 441; and see also *Colley v. L. & N. W. R. Co.*, *L. R.*, 5 *Ex. D.* 277).

(3) On the other hand where, by 4 & 5 Vict. c. 45, s. 17, a penalty is imposed upon unauthorized persons unlawfully importing books, reprinted abroad, upon which copyright subsists, the remedy by action is not taken away from the authors; for there is *a right* created in their favour, and the penalty is cumulative (*Novello v. Sudlow*, 12 *C. B.* 188; and for other instances of the enforcement of statutory rights or duties by action, see *Ross v. Rugge Price*, *L. R.*, 1 *Ex. D.* 269, and *Geddis v. Proprietors of Bann Reservoir*, *L. R.*, 3 *Ap. Ca.* 430).

Where no Right created. Sub-rule 1.—
Where a duty is created by a statute for the purpose of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action for damages in respect of such loss (*Gorris v. Scott*, *L. R.*, 9 *Ex.* 125).

(1) Thus, in the above case, the defendant, a ship-owner, undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage, some of the sheep were washed overboard, by reason of the defendant's neglect to take a precaution enjoined by an order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869. It was however held, that the object of the statute and order being to prevent the spread of contagious disease among animals, and not to protect them against the perils of the sea, the plaintiff could not recover.

(2) And so, where certain regulations were established by statute for the management of the pilchard fishery, and enforced by the imposition of penalties; it was held, that a fisherman who had lost his proper turn and station, according to the regulations, through the breach of them by another fisherman, could not maintain an action for damages against him, for the loss of a valuable capture of fish, which the latter had taken, through being in such wrong place; as the object of the statute was to regulate the fishery, and not to give any individual fisherman a right to any particular place (*Sterens v. Peacocks*, 11 Q. B. 741).

Common Law Rights not restricted. Sub-rule 2.—*Unless a statute expressly or by necessary implication restricts common law rights such rights remain unaffected.*

Thus the defendant was possessed of a steam traction-engine, and whilst it was being driven by

the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiff's standing on a neighbouring farm. The engine was constructed in conformity with the Locomotive Acts, 1861 and 1865, and there was no negligence in the management of it. It was nevertheless held that the defendant was liable on the ground that the engine being a dangerous machine (and, therefore, within the doctrine of *Fletcher v. Rylands*) an action would have been maintainable at common law, and that the Locomotive Acts did not restrict the common law liability (*Powell v. Fall*, *L. R.*, 5 *Q. B. D.* 597).

Felonies. RULE 7.—Where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, a cause of action arises immediately upon the commission of the offence; but (*semble*) notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress, if he has failed in his duty of bringing, or endeavouring to bring, the felon to justice. Where the offender has been brought to justice at the instance of some third person injured by a similar offence, or where prosecution is impossible

by reason of the death of the offender, or (?) by reason of his escape from the jurisdiction before a prosecution could by reasonable diligence have been commenced, the right of action is not suspended (per Baggallay, L. J., *Ex parte Ball, re Shepherd*, L. R., 10 Ch. D. 673; and see per Cockburn, C. J., *Wells v. Abrahams*, L. R., 7 Q. B. 557).

✓But although this would seem to be the rule, it is extremely doubtful how it can be enforced. It is certainly no ground for the judge at the trial to direct a nonsuit (*Wells v. Abrahams, sup.*). It cannot be raised by demurrer (*Roope v. D'Avigdor*, L. R., 10 Q. B. D. 412); nor by plea, because the effect of that would be to allow a party to set up his own criminality. But it has been suggested, that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the court might be invoked, to stay the proceedings which would involve an undue use, probably an abuse, of the process of the court (per Cockburn, C. J., *Wells v. Abrahams, sup.*). And in the same case, Blackburn, J., said, "I do not see how a plaintiff can be prevented from trying his action, unless the court, acting under its summary jurisdiction, interfere." . . . "From the time these cases were decided, there is no reported instance of the court having interfered to stop an action until we come to *Gimson v. Woodful*, 2 C. & P. 41. That

case went to this extent, that where a horse had been stolen by A., and B. afterwards had the horse, the owner could not afterwards bring an action to recover it from B., unless he had prosecuted A. But in *White v. Spettigue* (13 *M. & W.* 603) that was expressly overruled. The last case is *Wellock v. Constantine*, 32 *L. J., C. P.* 285." . . . "That case, I think, cannot be treated as an authority;" . . . "to say that because it was for the interest of the public, the action should be stayed until the indictment was tried, and for this purpose to nonsuit the plaintiff, or to direct the jury to find a verdict for the defendant upon issues not proved, seems to me to be erroneous."

In *Ex parte Ball, re Shephard* (*L. R.*, 10 *Ch. D.* 667), Bramwell, L. J., said: "There is the judgment in *Ex parte Elliott* (3 *Mont. & A.* 110), besides the expressed opinion for centuries, that the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways:—1. That no cause of action arises at all out of a felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence to, nor suspension of the claim by, or at the instance of the felon, but that the court of its own motion, or on the suggestion of the crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is not true is shown by *Marsh v. Keating* (1 *Bing. N. C.* 198), where it was held, that prosecution being impossible, a felony

gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon plus a prosecution. The cause of action would not arise till after both. Till then, the statute of limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt *and* the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of compositions with creditors, and those were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the statute of limitations to run? Suppose the debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule, *nemo allegans suam turpitudinem est audiendus*. Besides it would be absurd to suppose that the debtor himself ever would so plead, and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice Blackburn did as a possibility. Is it left to the court to find it out on the pleadings? If it appears on the trial, is the judge to discharge the jury? How is the crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action.

But, again, suppose it can be, what is the result? It has been held, that when the felon is executed for another felony the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still after the continued expression of opinion and the cases of *Ex parte Elliott* and *Wellock v. Constantine*, I should hesitate to say that there is no practical law as alleged by the respondent." Unfortunately the point was not necessary for the decision in *Ex parte Ball*, and consequently the law still remains in a very hazy and unsatisfactory state, with regard to which it is impossible to express any opinion with confidence. However the rule, as above expressed, has received the sanction of nearly three centuries; and although the criticisms of Lord Justice Bramwell throw some doubt upon its accuracy, it must, I think, be taken to be law until expressly overruled.

It would seem that the rule does not apply to an action *in rem* (see "*The Princess Royal*," *L. R.*, 3 *A. & E.* 41).

CHAPTER II.

OF QUASI TORTS.

Arising ex Contractu. Although a tort has been defined as a wrong independent of contract, there is nevertheless a class of injuries, which lie on the borderland, as it were, between contract and tort, and for which an action *ex contractu*, or *ex delicto*, may generally be brought at the pleasure of the party injured.

RULE 8.—Whenever there is a contract, and something to be done in the course of the employment, which is the subject of that contract, if there be a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract (*Brown v. Boorman*, 11 *Cl. & F.* 44).

(1) **Negligence of Professional Men.** Thus, if an apothecary carelessly or unskilfully administer improper medicines to a patient, whereby such patient is injured, he may sue him either for the breach of his implied contract to use reasonable skill and care, or for tortious negligence, followed by the actual damage (*Searl v. Prentice*, 8 *East*, 847).

(2) The plaintiff, who held a mortgage for 4,600*l.* upon lands belonging to one F., agreed to make him

a further advance of 400*l.* upon having an additional piece of land, which F. had subsequently acquired; added to the former security. The defendant, who acted as the plaintiff's solicitor in the matter, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land, in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying this 46*l.* :—Held, that this was negligence for which the solicitor was liable (*Whiteman v. Hawkins*, *L. R.*, 4 *C. P. D.* 13).

(3) **Waste.** So where a person, having an estate for life or years, commits waste, it is both a breach of the implied contract to deliver up the premises in as good a condition as when he entered upon them, and also an injury to the reversion, which is a violation of the reversioner's right, and therefore a tort.

(4) **Negligence of Owners of Market.** The defendants were owners of a cattle market, and in the market-place they had erected a statue, round which they had placed a railing. The plaintiffs attended the market with their cattle and occupied a site for which they paid toll. A cow, belonging to them, in attempting to jump the railing, injured herself, and subsequently died from those injuries. The jury found that the rail was dangerous:—Held, that the defendants having *received toll from the plaintiffs*, and invited them to come into the market with their cattle, a duty was imposed upon them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by the plaintiffs (*Lax v. Corp.*

of *Darlington, L. R.*, 5 *Ex. D.* 28, and see *Hyman v. L. R.*, 6 *Q. B. D.* 685).

Privity necessary. But, as a tort founded upon contract can only properly arise out of an infringement of some duty created by the contract, it is a well-established rule, that—

RULE 9.—Whenever a wrong is founded upon a contract within the meaning of Rule 8, no one, not a privy to the contract, can sue the person who has contracted in respect of such wrong (*Tollit v. Shenstone*, 5 *M. & W.* 289; *Winterbottom v. Wright*, 10 *M. & W.* 109). But if, in addition to the particular *injuria* committed by the contracting party to the contractee, the same circumstances constitute a tort by a third party to a third party, the third party so injured may sue the third party so injuring him (*Berringer v. S. E. R. Co.*, *L. R.*, 4 *C. P. D.* 163).

(1) Thus a master cannot sue a railway company for loss of services, caused by his servant being injured by the company's negligence when being carried by them; for the injury in such a case arises out of the contract between the company and the servant, to which the master is no party (*Alton v. Mid. R. Co.*, 34 *L. J.*, *C. P.* 292).

(2) And so it has been held by the American

courts, that where a steam boiler is defectively and negligently constructed by a manufacturer, and sold by him to a purchaser, and subsequently explodes and injures a third party, the manufacturer is only liable to the purchaser and not to the third party (*Losce v. Clute*, 51 *New York Rep.* 474, and *National, &c. v. Ward*, 100 *U. S. Rep.* 195; and see also *Longmeid v. Holliday*, 6 *Ex.* 761; and *Heaven v. Pender*, *L. R.*, 9 *Q. B. D.* 302). On the other hand, it has been held by the American courts, that a dealer in drugs who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into the market, is liable to *all* persons, whether purchasers or not, who, without fault on their part, are injured by using it as medicine. The liability of the dealer, however, arises in that case, not out of any contract, but out of the duty which the law imposes upon him to avoid *acts in their very nature* dangerous to the lives of others (*Thomas v. Winchester*, 6 *New York Rep.* 397). At first sight this seems difficult to reconcile with the case of the defective boiler, but it is apprehended that the distinction consists in this, that the direct and obvious consequence of labelling poison as medicine is to inflict damage, whereas the fact that a person is killed by the bursting of a steam boiler is only a remote consequence of its defective construction. In short it is not a *wrongful act* in itself to construct a steam boiler defectively, but it is a wrongful act to label poison as medicine.

(3) But, on the other hand, where a servant took a ticket of the London and Tilbury Railway Company, who thereby impliedly contracted to carry him

with care and without negligence, and the servant travelled in a train drawn by an engine of the South-Eastern Railway Company, and the latter company also provided the signalman and so on, and owing to their negligence a collision happened, and the servant was injured, it was held that the master could sue the South-Eastern Railway Company. For although he could not sue the London and Tilbury Company, because, *quà* them, the wrong was one arising out of contract in respect of which the servant alone could sue, yet the negligence of the South-Eastern Railway Company did not arise out of any contract. They were entire strangers to the contract, and their tort was a tort pure and simple, and consequently the master could sue in respect of it (*Berringer v. S. E. R. Co., L. R., 4 C. P. D. 163*).

When Privity unnecessary. Sub-rule.—*But where there is a distinct tort to the plaintiff altogether separate and apart from the breach of contract to a third party, although connected with it, the plaintiff may maintain an action.*

(1) Thus in cases of fraud (as is hereafter mentioned) a man is responsible for the consequences of a breach of a warranty made by him to another, upon the faith of which a third person acts; provided that such false representation was made with the direct intent that it should be acted upon by such third person (*Barry v. Crossbey, 2 Johns. & H. 21*).

(2) And so where a father bought a gun for the use of himself and his son, and the defendant sold

it to him *for that purpose*, fraudulently representing it as sound, and it exploded and injured the son; 'it was held that he could maintain an action of tort, although not privy to the warranty (*Langridge v. Levy*, 4 *M. & W.* 338).

(3) So, where the defendant sold to A. a hairwash, *to be used by A.'s wife*, and professed that it was harmless, but in reality it was very deleterious, and injured A.'s wife, it was held that she had a good cause of action against the defendant (*George v. Skivington*, *L. R.*, 5 *Ex.* 1). This decision has been dissented from by Field and Cave, JJ., in *Heaven v. Pender* (*L. R.*, 9 *Q. B. D.* 302), but their decision was reversed on appeal (*L. R.*, 11 *Q. B. D.* 503).

(4) So if a surgeon treat a child unskilfully, he will be liable to the child, even though the parent contracted with the surgeon (*Pippin v. Sheppard*, 11 *Price*, 400).

(5) So "a stage-coach proprietor who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustain personal injury, is liable to him; for *it is a misfeasance towards him if, after taking him as a passenger*, the proprietor drives without due care, and, as will be seen from the next rule, a misfeasance is a distinct tort" (*Longmeid v. Holliday*, 6 *Ex.* 767, per Parke, B.).

(6) And so, on the same ground, where a servant travelling with his master, who took his ticket and paid for it, lost his portmanteau through the railway company's negligence, he was held entitled to sue the company (*Marshall v. York, &c. R. Co.*, 21 *L. J.*, *C. P.* 34).

Misfeasance. There is a class of contracts which are particularly nearly allied to torts. Such are, gratuitously undertaken duties. Such duties are not contracts in one sense, namely, that, being without consideration, the contractor is not liable for their nonfeasance, *i. e.* for omitting to perform them. But, on the other hand, if he once commences to perform them, the contract then becomes choate as it were, by virtue of the following rule—

RULE 10.—The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in its performance (*Coggs v. Bernard*, 1 Sm. L. Ca. 177, 6th ed.).

(1) Thus, in the above case, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and, in doing so, one of the casks got staved through his gross negligence. Upon these facts it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet, having once entered upon the performance of it, he thence became liable for all misfeasance.

(2) Again, the defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond Station of the South Western Company. Above the booking office at the Richmond station are the words “South Western and Metropolitan Booking Office and District Railway.” The

plaintiff took from the clerk there employed by the South Western Company a return ticket to Hammersmith and back. The ticket was not headed with the name of either Company, but bore on it the words "via District Railway." On his return journey from Hammersmith the plaintiff travelled with this ticket in a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond Station platform, the plaintiff, in alighting, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:—Held, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, *even assuming the ticket not to have been issued by or for them, but for the South Western Company* (*Foulkes v. Met. Dist. R. Co.*, *L. R.*, 4 *C. P. D.* 267; and on appeal, *L. R.*, 5 *C. P. D.* 157).

(3) So, persons performing a public duty gratuitously, are responsible for an injury to an individual through the negligence of workmen employed by them (*Clothier v. Webster*, 12 *C. B.*, *N. S.* 790; *Mersey v. Gibbs*, *L. R.*, 1 *H. L.* 93; *Foreman v. Mayor*, *L. R.*, 6 *Q. B.* 217).

Bailments. Such is a brief account of the law upon this head:

In some works, injuries to goods whilst in the

keeping of carriers and innkeepers, are described as torts; in others as breaches of contract; but however actions in respect of them may be framed, they are in substance *ex contractu*, being for non-performance of the contract of bailment, and not for a tort independent of contract (*Roscoe*, 539; 2 *Bl. Com.* 451; *Legge v. Tucker*, 26 *L. J.*, *Ex.* 71). I shall therefore not treat of them in this work.

CHAPTER III.

OF THE LIABILITY OF MASTERS FOR THE TORTS OF
THEIR SERVANTS.

SECTION 1.

Liability to Third Parties.

General Liability. It is a well-known legal maxim, that *qui facit per alium, facit per se*, whence the following rule is easily deduced—

RULE 11.—A person who puts another in his place, to do a class of acts in his absence, is answerable for the torts of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what is done is done by the servant, in the course of his employment (*Bayley v. Manchester, Sheff. & Lincoln. R. Co., L. R., 7 C. P. 415*).

Thus if a servant drive his master's carriage over a bystander; or if a gamekeeper employed to kill game, fire at a hare and kill a bystander; or if a workman employed in building, negligently drop a stone from the scaffold, and so hurt a bystander;

the person injured may claim reparation from the master; because the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself, or of his servants when acting within the scope of their employment (*Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Ca. 266).

Acts done outside the Employment. Sub-rule 1.—*A master is not responsible for the wrongful act of his servant, unless the act was an act done by the servant in the course of his employment.*

(1) It was the course of employment of the carman of the defendant, who was a brewer, with the defendant's horse and cart to deliver beer to the customers, and on his return collect empty casks, for each of which he received a penny. The carman having, without the defendant's permission, taken out the horse and cart *for a purpose entirely of his own*, on his way back collected some empty casks, and while thus returning the plaintiff's cab was injured by the carman's negligent driving. Under these circumstances, it was held that the defendant was not liable, and Lindley, J., said, "The question is, whether, under these circumstances, the servant was acting in the course of his employment. In my judgment he was not. It is certain that the servant did not go out in the course of the employment. Does it alter the case, that whilst coming back, he picks up the casks of a customer? I think it does not. He was returning on a purpose of his own, and he did not convert his own private occupation

into the employment of his master simply by picking up the casks of a customer. The conclusion, therefore, to which I come is, that the servant was not engaged in his master's business in any sense, and therefore our judgment must be for the defendant" (*Rayner v. Mitchell*, L. R., 2 C. P. D. 357).

(2) So, where a master intrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so drove over the plaintiff, the master was held not to be responsible, on the ground that the servant was not acting within the scope of his employment; for he had started upon a new and entirely independent journey which had nothing to do with his employment (*Storey v. Ashton*, L. R., 4 Q. B. 476). But if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not be considered as taking him out of his master's employment (*Mitchell v. Crassweller*, 22 L. J., C. P. 100; and see *Whiteley v. Pepper*, L. R., 2 Q. B. D. 276).

(3) So, where a servant wantonly, and not in the execution of his master's orders, struck the plaintiff's horses, and so produced an accident, the master was held not to be liable (*Croft v. Alison*, 4 B. & A. 590; but query whether this case is consistent with sub-rule 2).

(4) The plaintiffs occupied offices beneath those of the defendant's. In the defendant's office was a lavatory for his own use exclusively, and the use of which was expressly forbidden to his clerks. One of the latter, nevertheless, used it, and left the water running,

whereby the plaintiffs' offices were flooded. Held, that the act of the clerk was not within the scope of his authority or incident to the ordinary duties of his employment, and that the defendant was not liable (*Stevens v. Woodward*, L. R., 6 Q. B. D. 313).

Wilful act. Sub-rule 2.—*A master is responsible for the acts of his servant, within the general scope of his employment, while engaged in his master's business, whether the act be done negligently, wantonly, or even wilfully; the quality of the act does not excuse. But if the servant without regard to his service, or his duty therein, or solely to accomplish some purpose of his own, acts maliciously or wantonly, the master is not liable* (*Mott v. Consumers Ice Co.*, 73 New York Rep. 543).

(1) In *Limpus v. London General Omnibus Co.* (11 W. R. 149; 7 L. T., N. S. 245), the driver of an omnibus plying between P. and K., whilst plying between those places, wilfully, and contrary to express orders from his master, pulled across the road, in order to obstruct the progress of the plaintiffs' omnibus. In an action of negligence, it was held, that if the act of driving across to obstruct the plaintiffs' omnibus, although a reckless driving, was nevertheless an act done in the course of the driver's service, and to do that which he thought best for the interest of his master, the master was responsible; that his liability depended upon the conduct of the servant in the course of his employment, and that the orders given to him not to obstruct were immaterial. And Willes, J., said, "It appears to me that this was a case of improper driving, and not a case

in which the servant did anything altogether inconsistent with the discharge of his duty towards his master and out of the course of his employment, a fact upon which it appears to me that the case turns. This omnibus of the defendant's was driven before the omnibus of the plaintiffs. Now, of course, one may say that it is no part of the duty of a servant to obstruct another omnibus; and in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say that in my opinion those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the *acts of his servants in the course of his employment*; and the law is not so futile as to allow the master, by giving secret instructions to his servant, to set aside his own liability. I hold it to be perfectly immaterial that the master directed the servant not to do the act which he did. As well might it be said that if a master employing a servant told him that he should never break the law, he may thus absolve himself from all liability for any act of his servant, though in the course of his employment. . . . The proper question for the jury to determine is, whether what was done was in the course of the employment, and for the benefit of the master." Blackburn, J., also, quoting and approving the charge of the learned judge who tried the case, said, "If the jury came to the conclusion that he did it, not to further his master's interest, not in the course of his employment as an omnibus driver, but from private spite, with an object to injure his enemy—who may be supposed to be the rival omnibus—that would be

out of the course of his employment. That saves all possible objections."

(2) The case of *Poulton v. London and South-Western R. Co.* (*L. R.*, 2 *Q. B.* 534) seems, at first sight, to be inconsistent with the above case. There, a station-master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff, and detained him in custody until it was ascertained by telegraph that all was right. The railway company had no power whatever to arrest a person for nonpayment of carriage, and therefore the station-master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station-master; and Blackburn, J., said: "In *Limpus v. General Omnibus Co.*, where the question was, whether or not the direction of my brother Martin was erroneous, there was a difference of opinion. The late Mr. Justice Wightman thought it was; that the learned judge had gone too far to make the company liable: the other judges thought that there had been no misdirection, and that the act done by the driver was within the scope of his authority, though no doubt it was a wrongful and improper act, and, therefore, that his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be

right on the part of the company to do. Having no power themselves, they cannot give the station-master any power to do the act." And Mellor, J., said: "If the station-master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns" (but see *Moore v. Metropolitan R. Co.*, *L. R.*, 8 *Q. B.* 36).

(3) In *Goff v. Great Northern R. Co.* (3 *E. & E.* 672), on the other hand, the act was the arresting a man for the benefit of the company where there was authority to arrest a passenger for nonpayment of his fare; and the court accordingly held, that the policemen who were employed, and the station-master, must be assumed to be authorized to take people into custody whom they believed to be committing the act, and that if there was a mistake, it was a mistake within the scope of their authority.

(4) So, again, in *Bayley v. Manchester, Sheffield and Lincoln. R. Co.* (*L. R.*, 7 *C. P.* 415), the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong car-

riage, or travelling therein without having first paid his fare and taken a ticket, and they even contained certain provisions which implied that the passengers should be treated with consideration; but nevertheless, the court considered that it was within the probable scope of a porter's authority gently to remove any person in a wrong carriage, and as the porter had exercised his probable authority violently, they held that the company was responsible (see also *Seymour v. Greenwood*, 6 H. & N. 359).

(5) So where a bye-law of a railway company forbade any persons, except employes, to ride on baggage cars, and enjoined the officials to strictly enforce the rule, and one of the officials, while the train was in motion, ordered a passenger to get off one of the baggage cars; and upon his failure to comply, *kicked him off*, whereby he fell under the wheels, and was greatly injured. It was held by the New York court that the company was liable, on the ground that "it is not necessary to show that the master expressly authorized the particular act: it is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority; and this, although he departed from the private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury" (*Rounds v. Delaware, &c. Railroad*, 64 New York Rep. 129). And so in *Cohen v. Dry Dock Co.* (69 New York Rep. 170), it was laid down that "a master is liable, where the servant is engaged at the time in doing his master's business, and is acting within the

general scope of his authority, although he is reckless in the performance of his duty, or through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable injury."

Doctrine of Ratification. The preceding remarks have reference only to cases in which the injury has been occasioned either by the negligence of the servant in the course of his employment, or by his wilful act, done under such circumstances as make it probable that he was authorized to commit it, upon proper occasion, but had used such authority injudiciously or carelessly. But there is a third class which differs from both of these, viz. where a servant commits a tort whilst not acting in pursuance of his master's employment, but which the master subsequently adopts.

RULE 12.—A tortious act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, and whether it be for his detriment or his advantage, to the same extent as if the same act had been done by his previous authority (*Wilson v. Tumman*, 6 M. & Gr. 242).

This rule is generally expressed by the maxim,

“*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur,*” and is equally applicable to torts and to contracts. It should be observed that the act *must* have been done for the use or for the benefit of the principal (4 *Inst.* 317; *Wilson v. Barker*, 4 *B. & Ad.* 614; and judgment, Dallas, C. J., *Hull v. Pickersgill*, 1 *B. & B.* 286).

Meaning of “Servant.” The term “servant” does not exclusively apply to menials.

RULE 13.—When a man is hired by the master, either personally or by those who are intrusted by the master with the hiring of servants, to do the business required of him, the master will be responsible for any torts committed by him within the scope of such business (*Laugher v. Pointer*, 5 *B. & C.* 547); but a contractor, sub-contractor, or other person exercising an independent employment, is not a servant within the meaning of the rule (*Rapson v. Cubitt*, 9 *M. & W.* 710; *Pearson v. Cox*, *L. R.*, 2 *C. P. D.* 369).

(1) The first part of this rule, applies not only to domestic servants but to clerks, managers, agents, and in short all whom the master appoints to do any work, and over whom he retains any control or right of control, even though they be not in the immediate employ, or under the immediate superintendence, of the master. Thus “if a man is owner

of a ship, he himself appoints the sailing master, and desires him to appoint and select the crew ; the crew thus become appointed by the owner, and are his servants for the management of his ship : and if any damage happen through their default, it is the same as if it happened through the immediate default of the owner himself ” (*Laugher v. Pointer*, *sup.*, per Littledale, J.).

(2) A contractor employed by navigation commissioners, in the course of executing the works flooded the plaintiff’s land, by improperly, and without authority, introducing water into a drain insufficiently made by himself. Here the contractor, and not the commissioners, was held liable (*Allen v. Howard*, 7 Q. B. 960).

(3) So where a company contracted with A. to construct a railway, and A. sub-contracted with B. to construct a bridge on it, and B. employed C. to erect a scaffold under a special contract between him and C. ; a passenger injured by the negligent construction of the scaffold could only sue C., and not A., B., or the company (*Knight v. Gex*, 5 Ex. 721) ; but it is open to doubt whether such a case would not now be held to come within the principle of sub-rule 1, *infra*, part (c).

(4) So where a butcher bought a bullock, and hired a licensed drover to drive it to his shop ; and the drover, instead of so doing, employed a boy for the purpose ; it was held that the butcher was not liable for the injurious consequences caused by the boy’s negligence, as the relation of master and servant did not exist between them (*Milligan v. Wedge*, 12 A. & E. 737).

(5) The defendant, a livery stable keeper, employed a builder (an independent contractor) to build a shed for carriages on his premises. The plaintiff deposited two carriages with him for safe keeping, which were placed in the shed. The building being blown down by a high wind, the carriages were injured: Held, it appearing that the builder was a man whom a reasonable and careful man might trust, that the defendant was not liable, even although the building was undoubtedly negligent (*Searle v. Laverick*, *L. R.*, 9 *Q. B.* 122).

(6) So if the owner of a carriage hire horses from a job master, who at the same time provides a driver, the job master is liable for accidents caused by the driver's negligence, for he is his servant, and not that of the owner of the carriage (*Quarman v. Burnett*, 6 *M. & W.* 499.) And *quà* the public a similar principle applies to cab proprietors and cab drivers where the proprietor finds both cab and horse (*Venables v. Smith*, *L. R.*, 2 *Q. B. D.* 279); but it is otherwise where the driver finds the horse and harness or merely hires the cab (*King v. Spurr*, *L. R.*, 8 *Q. B. D.* 104).

Liability of Employer for Contractor's Torts. Sub-rule 1.—*A person employing a contractor will, however, be liable for the contractor's wrongful acts, if either (a) the employer retains his control over the contractor, and personally interferes and makes himself a party to the act which occasions the damage; or (b) where the thing contracted to be done is itself unlawful; or (c) where a legal duty is incumbent upon the employer,*

and the contractor either omits or imperfectly performs such duty; or (d) where the thing contracted to be done is lawful in itself, but is likely in the natural course of events to cause injury to a neighbouring property unless means are adopted by which such consequences may be prevented, and the contractor omits to adopt such means (Hughes v. Percival, L. R., 8 Ap. Ca. 443).

(1) Thus where the defendant employed a contractor to make a drain, and the contractor's man left some of the soil in the highway, in consequence of which an accident happened to the plaintiff, and afterwards the defendant, on complaint being made, promised to remove the rubbish, and paid for carting part of it away, *and it did not appear that the contractor had undertaken to remove it*; it was held that the defendant was liable (*Burgess v. Gray*, 1 C. B. 578).

(2) A company, not authorized to interfere with the streets of Sheffield, directed their contractor to open trenches therein; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets was in itself an injuria or wrongful act (*Ellis v. Sheffield Gas Consumers' Co.*, 23 L. J., Q. B. 42).

(3) So where the defendants were authorized by an act of parliament to construct an opening bridge over a navigable river, a duty was cast upon them to construct it properly and efficiently; and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable, and could not excuse themselves by throwing the blame on their con-

tractor (see *Hole v. Sittingbourne, &c.*, 6 H. & N. 488).

(4) Plaintiff and defendant were owners of two adjoining houses, plaintiff being entitled to the support for his house, of defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations and rebuild the house. The contractor undertook the risk of supporting the plaintiff's house as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means, taken by the contractor to support it, being insufficient. Held, on the principle (d) above laid down, that the defendant was liable (*Bower v. Peate*, L. R., 1 Q. B. D. 321; and see to same effect *Tarry v. Ashton*, *ib.* 314, and *Angus v. Dalton*, L. R., 6 Ap. Ca. 740).

Temporary Employment by Another.

Sub-rule 2.—*Where a master temporarily lends his servant to another, under whose immediate control he is for the time being, and whose work he is doing, the master will not be responsible for his servant's torts committed during such temporary employment by another.*

(1) Thus in *Rourke v. White Moss Coal Co.* (L. R., 2 C. P. D. 205), the defendants had contracted with W. to sink a shaft for them at so much a yard, W. to provide all necessary labour, the defendants providing steam power and machinery, and two engineers, to be under the control of W. The plaintiff, one of W.'s workmen, was injured by the negligence

of L., one of the defendants' engineers ; but it was held that the company were not liable for this injury, on the ground, that although L. was their general servant, yet at the time of the injury he was not actually employed in doing their work, and was under the immediate control of W., to whom he had been lent by them, and whose servant, therefore, he must be considered to have been.

Unauthorized Delegation by a Servant.

RULE 14.—A master is not, in general, liable for the tortious acts of persons to whom his servant has, without authority, delegated his duties, and between whom and the master the relation of master and servant does not exist (*submitted*, and see *Jewell v. Grand Trunk Railway*, 55 N. H. 84).

(1) Thus it is apprehended that if a master wrote to his groom and ordered him to take the carriage to such a place, and the groom, instead of taking the carriage himself, employed A. to do it for him without having ever had any authority from the master to intrust A. with the carriage, and A. so carelessly drove the carriage as to injure B., no action would lie against the master. For the master never hired the groom for the purpose of employing others to do his work, and therefore, in intrusting the carriage to A., he would be acting beyond the scope of his employment, and beyond his probable authority.

(2) But if, on the other hand, the groom had taken A. with him, and had handed the reins to

him, it is submitted that the master would be liable, because the handing of the reins to another whilst he was in the act of performing his duty would be a default in the performance of that duty, and not a complete retirement from its performance (see per Lord Abinger, *Booth v. Mister*, 7 C. & P. 66, and *Joel v. Morrison*, 6 C. & P. 503).

Such is a brief outline of the law relating to the responsibility of masters to third parties for the torts of their servants; but the learning on the subject is of so technical a character, and the distinctions as to when a servant is, and when not, acting within the scope of his employment, or even whether he be a servant at all, are so very refined, and the authorities are so conflicting, that a legal training is often necessary in order that the difference may be distinguished. I shall therefore content myself with the foregoing general rules (which are believed to be accurate so far as they go), leaving to other and larger works on the law of master and servant the task of quoting the numerous cases on the subject and commenting upon the very subtle distinctions between them. I would particularly recommend the chapter on the master's liability contained in Mr. Manley Smith's excellent and exhaustive treatise on Masters and Servants, as a very complete exposition of the law on this subject, and would also call the student's attention to the reports of the following cases, namely:—*Storey v. Ashton*, L. R., 4 Q. B. 476;

Whatman v. Pearson, L. R., 3 C. P. 422 (very conflicting); *Lord Bolingbroke v. Local Board of Swindon*, L. R., 9 C. P. 575; *Murray v. Currie*, L. R., 6 C. P. 24; *McManus v. Cricket*, 1 East, 106; *Gregory v. Piper*, 9 B. & C. 591; *Mitchell v. Crasweller*, 13 C. B. 237; *Francis v. Cockerill*, L. R., 5 Q. B. 184; *Lyon v. Marten*, 8 A. & E. 512; *Overton v. Freeman*, 11 C. B. 867; *Cuthbertson v. Parsons*, 21 L. J., C. P. 165; *Welfare v. L. B. & S. C. R. Co.*, L. R., 4 Q. B. 693; and *Wilson v. Merry*, L. R., 1 H. L. 326.

SECTION 2.

Liability to Servants for Injuries caused by Fellow-servants.

Previously to the 1st of January, 1881, the liability of a master to his servant for an injury resulting from the negligence of his fellow-servant differed very materially from his liability to a third party for a similar injury. On that day, however, the Employers' Liability Act (43 & 44 Vict. c. 42) came into operation, and with regard to certain classes of servants, makes a considerable alteration in the common law. The act is, however, merely tentative, being passed for a period of seven years only, and a master and servant may, by mutual arrangement, contract themselves out of its provisions. Consequently (1) even with regard to the class of servants who fall within the provisions of the statute, the common law rules still apply in cases where the master and servant contract themselves out of the

act; (2) unless the act is renewed at the end of seven years, then the common law rules will be again universally applicable; and (3) there are still a large class of servants (domestic and menial and other servants) who do not come within the meaning of the act at all. For these reasons it is necessary that the student should first consider the common law liability of a master towards his servant, and then he may with advantage examine how far those rules are modified by the statute in question.

SUB-SECTION 1.—*Common Law Liability.*

Liability of Master for Injuries caused by Servant to Fellow-servant. RULE 15.
—A master is not liable to his servant for damage resulting from the negligence of his fellow-servant in the course of their common employment, unless the servant causing the injury was incompetent to discharge his duty, or the servant injured was not at the time acting in his master's employment.

(1) Thus where a workman at the top of a building carelessly let fall a heavy substance upon a fellow workman at the bottom, the master was held not to be responsible, without proof of the incompetency of the workman causing the injury to discharge the duty in which he had been employed (*Wiggett v. Fox*, 25 L. J., Ex. 118).

(2) So in *Hall v. Johnson* (34 L. J., Ex. 222), the plaintiff was a miner in defendants' employ, as was also an underlooker whose duty it was to see that as the mine was excavated the roof should be propped up. This he neglected to do, whereby a stone fell and injured the plaintiff; but it was held that this attached no liability to the defendants, as no proof was given that they did not use due care in selecting the underlooker for his post.

Meaning of Common Employment. Sub-rule:—*It is not necessary to the application of the above rule, that the servant causing, and the servant sustaining, the injury, should both be engaged in precisely the same, or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages* (*Morgan v. Vale of Neath R. Co.*, L. R., 1 Q. B. 149; *Allen v. New Gas Co.*, L. R., 1 Ex. D. 251).

(1) Thus the driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from, a pit, the miners working therein, and the miners themselves; all these are fellow labourers within the meaning of the doctrine (*Bartonshill Coal Co. v. Reid*, 4 Jur., N. S. 767). The real test seems to be, whether they are engaged in the same pursuit.

(2) In *Morgan v. Vale of Neath R. Co.* (L. R., 1 Q. B.

149), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenters' work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turntable, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown to the ground and injured. It was held, however, that he could not recover against the company, on the ground, that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment. (See *Lovell v. Howell, L. R., 1 C. P. D. 161.*)

(3) And again, in *Turnney v. Mid. R. Co. (L. R., 1 C. P. 291)*, the plaintiff was employed by a railway company as a labourer, to assist in loading what is called "a pick-up train," with materials left by platelayers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham (where he resided and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham after his day's work was done, the train by which he was travelling came into collision with another train, through the negligence of the guard who had charge of it, and the plaintiff was injured. The plaintiff accordingly sued

the company, but the court held, that, inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment.

(4) So, again, in *Feltham v. England* (*L. R.*, 2 *Q. B.* 33), the defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood, supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved, having, just before, ordered the plaintiff to get on the engine to clean it. The plaintiff having got on to the engine, the piers gave way, the engine fell, and the plaintiff was injured. Here it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial; and that as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskilful or incompetent persons to build the piers, he was not liable to the plaintiff.

(5) So where two railway companies, A. and B., have a joint staff of signalmen, and one of them gets

injured through the negligence of the private engine driver of company A., such company will not be liable. For, although the injured man is the servant of A. and B., and the engine driver is the servant of A. only, yet they were engaged in a common pursuit so far as company A. were concerned, although the signalman was also engaged in a further and additional pursuit on behalf of B. (see *Swainson v. N. E. R. Co.*, *L. R.*, 3 *Ex. Div.* 341). But where one of two companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply (*Warburton v. G. W. R. Co.*, *L. R.*, 2 *Ex.* 30; and see *Turner v. G. E. R. Co.*, 33 *L. T.* 431).

(6) And so the rule does not apply where one servant is the servant of a contractor, and the other is the servant of the person who employs the contractor; for the servant of the contractor is not the servant of the contractor's employer (*Parry v. Smith*, *L. R.*, 4 *C. P. D.* 325). It must, however, be borne in mind, that it is sometimes a question of difficulty whether a person holds the position of a contractor, or of a foreman in charge of a gang of workmen; and that in the latter case the rule as to fellow-servants applies (*Charles v. Taylor*, *L. R.*, 3 *C. P. D.* 492).

Negligence of Master. RULE 16.—A master is bound to take reasonable precautions to insure his servant's safety; and if, through the absence of such reasonable precautions, or through the breach of some duty incumbent on the master, or through the personal negligence of the master, the servant is injured, the master will be responsible (*Ormond v. Holland*, *E. B. & E.* 102; *Ashwix v. Stanwix*, 30 *L. J.*, *Q. B.* 183), unless the servant knew of the danger, in which case he will be presumed to have accepted it as one of the risks incident to his employment. (*Griffiths v. London and St. Katharine's Dock Co.*, *L. R.*, 12 *Q. B. D.* 493.)

(1) Thus in *Mellors v. Shaw* (30 *L. J.*, *Q. B.* 333), the defendants were owners of a coal mine, and the plaintiff was employed by them as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by them. By the defendants' negligence the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition. By reason of this, and also by reason of no sufficient or proper apparatus having been provided by the defendants to protect their miners from the unsafe state of the shaft, a stone fell from the side of the shaft on to the plaintiff's head, and he was dangerously wounded. One of the defendants was manager of the mine, and

it was worked under his personal superintendence, and the plaintiff was not aware of the state of the shaft. On this state of facts the defendants were held liable.

(2) So, where a builder knowingly erects a scaffolding of unsound wood, and one of his workmen is injured in consequence, he will be liable (see *Roberts v. Smith*, 2 H. & N. 213).

(3) So, where a master ordered a servant to take a bag of corn up a ladder which the master knew, and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable (*Williams v. Clough*, 3 H. & N. 258).

(4) It has been held, in the United States, that where the negligence of an engineer of a train in running it, is contributory with that of the company in not sending a sufficient number of brakemen, and both together cause an injury to an employé, the negligence of the engineer does not relieve the company from liability (*Booth v. Boston, &c.*, 73 *New York Rep.* 38).

Master's Knowledge of a Servant's Incapacity. Sub-rule 1.—*If the master or his manager carelessly places by the side of his servant, a fellow-servant unskilled and incompetent, and damage results to the servant in consequence, the master is liable. And this is so whether the incompetency or want of skill of the fellow-servant existed when he was hired, or has come upon him since, and he has been continued in service with notice or knowledge, or the means of knowledge, upon the part of the master, of the defect. It is the duty of the master to*

his servant to discharge from his service, upon notice thereof, any other servant who, from any cause, has ceased to be competent and skilful (Laning v. N. Y. Cent. R. R., 49 New York Rep. 521).

The above is submitted, but whether it would be followed by the English Courts is doubtful.

Servant's Knowledge of Danger. Sub-rule 2.—*Where a servant is injured by an instrument which he is himself using in the course of his employment, and of the nature of which he is as much aware as his master, he cannot recover against the master, notwithstanding that such instrument was not the safest for effecting the object in view. (See Griffiths v. London and St. Katharine's Dock Co., L. R., 12 Q. B. D. 493.)*

(1) Therefore, where a labourer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on a clip, and the clip had slipped off, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weight was usual, and had been discarded by the master's orders (*Dyner v. Leach*, 26 L. J., Ex. 221; and see also *Senior v. Ward*, 1 E. & E. 385).

(2) A hoarding had been erected by the defendant, a builder, which projected too far into the street, but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding and close to it. A cart, in passing, struck against the hoarding, and knocked down the machine against the plaintiff,

a workman in the defendant's employ. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved. It was here held, that there was no evidence to go to the jury of the master's liability (*Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 H. & N. 648). But see *Holms v. Worthington*, 2 F. & F. 533, where Mr. Justice Willes seems to have thought that acquiescence by the workman in the reasonable expectation of the known defect being made good did not excuse the master. This was, however, a *nisi prius* case, and never came before the court in banco.

Volunteers. RULE 17.—If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by the negligence of another servant of the same master, he is considered to be a servant *pro tempore*, and no action will lie against the master, unless (perhaps) he were guilty of personal negligence or breach of duty, or the servants were not competent persons.

The reason of this rule is obvious, for the volunteer, by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. The

latter cannot therefore be fairly called upon to recompense him for the result of his officiousness.

Thus where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and, whilst so engaged, other servants of the company negligently propelled a locomotive against, and so killed the volunteer, and the servants of the company were of competent skill, and the company did not authorize the negligence, it was held that the company was not liable (*Degg v. M. R. Co.*, 1 H. & M. 773; *Potter v. Faulkner*, 1 B. & S. 800).

Exception. Where a person aids the servants of another, with such other's consent or acquiescence, not as a mere volunteer but for the purpose of expediting some business of his own, he is not considered to be in the position of a servant *pro tempore*.

Thus where the plaintiff sent a heifer by the defendants' railway to P., and on its arrival, there being only two porters to shunt the truck, the plaintiff, in order to save delay, assisted in shunting the truck, and was injured by the negligence of one of the defendants' engine-drivers, and there was evidence that the station-master assented to his aiding in the shunting, it was held that he was entitled to recover damages (*Wright v. L. & N. W. R. Co.*, L. R., 1 Q. B. D. 252).

SUB-SECTION *b.*—*Employers' Liability Act (a).*

RULE 18.—Any (1) railway servant, (2) labourer, (3) servant in husbandry, (4) journeyman, (5) artificer, (6) handicraftsman, (7) miner, or (8) other person engaged in manual labour (not being a domestic or menial servant) (sect. 8, and 38 & 39 Vict. c. 90, s. 10), may, under the act, sue his employer, as if the relation of master and servant did not subsist between them (sect. 1), for any personal injury caused after the 1st of January, 1881 :—

- (a) By reason of any defect in the ways, works, machinery, or plant used in the employer's business, which defect was caused, or remained undiscovered or unremedied, through the negligence of the master or of a fellow-servant whose duty it was to see to the condition of such ways, works, machinery or plant (sect. 1, subs. 1, and sect. 2, subs. 1; see *McGiffen v. Palmer & Co.*, *L. R.*, 10 *Q. B. D.* 5).
- (b) By reason of the negligence of a fellow-servant who has any superintendence entrusted to him, whilst in the exercise of such superintendence (sect. 1, subs. 2; see *Shaffers v. Gen. Steam, &c. Co.*, *L. R.*, 10 *Q. B. D.* 356; *Gibbs v.*

G. W. R. Co., L. R., 11 Q. B. D. 22;
and *Osborne v. Jackson, ib. 619*).

- (c) By reason of the negligence of a fellow-servant to whose orders the injured servant is, at the time of the injury, bound to conform, where the injury results from so conforming (sect. 1, subs. 3).
- (d) By reason of the act or omission of any fellow-servant done or made in pursuance of an improper, or defective bye-law of the employer, or in obedience to a particular instruction of the employer or some person duly delegated by him, where the injury results from the impropriety or defect in the bye-law or instruction. But no bye-law is to be deemed defective which shall have been approved as proper by any department of government under any act of parliament (sect. 1, subs. 4, and sect. 2, subs. 2).
- (e) By reason of the negligence of a fellow-servant having the management of points, signals, a locomotive or a train (sect. 1, subs. 5. Applicable to private railway, *Doughty v. Firebank, L. R., 10 Q. B. D. 358*).

Provided that the servant injured cannot

recover if he knew of the defect or negligence, and did not complain to the master or his manager within a reasonable time, unless he knew that the master or manager was aware of it (sect. 2, subs. 3).

Personal Representatives of Servant Killed. Sub-rule 1.—*In case the injury results in death, the legal personal representatives of the workman are entitled to bring the action (sect. 1).*

Amount of Damages. Sub-rule 2.—*The damages are limited to a sum equal to the estimated earnings of a person in the grade, employment, and district, of the person injured during the three years immediately preceding the injury (sect. 3); and if any penalty shall have been paid to him or his executors or administrators by the employer under any statute, such penalty shall be deducted from the compensation actually awarded, and shall not be recoverable after damages shall have been given under the act (sect. 5).*

Limit of Time for commencing Action. Sub-rule 3.—*Notice of the injury must be given to the employer within six weeks; the action must be commenced within six months after the date of the injury, or in case of death within twelve months, but in the latter case the want of notice shall be no bar, if the judge thinks there was reasonable excuse for not giving it (sect. 4). The notice must (unless the judge waives an error (sect. 7)) give the name and address of the injured servant and state the cause and date of the injury, and must be served*

by delivering it at the place of business or residence of the master, or sending it in a registered letter properly addressed to the master at such place as aforesaid or at his last known place of business or residence (sect. 7), and must be in writing (Moyle v. Jenkins, L. R., 8 Q. B. D. 116), and such writing ought to contain all the above particulars, and not refer merely to particulars taken down by the defendant from the plaintiff's verbal statement (Keen v. Millwall Docks Co., L. R., 8 Q. B. D. 482), but it need not be technically accurate (Stone v. Hyde, L. R., 9 Q. B. D. 76).

Mode of Trial. Sub-rule 4.—*Actions, under this act, must be brought in the county court, but may be removed to the superior court in like manner, and upon the same conditions, as an action commenced in a county court may be by law removed (sect. 6). Such removal will, however, only be ordered under very exceptional circumstances (Munday v. Thames, &c. Co., L. R., 10 Q. B. D. 59).*

It is competent for an employer and his servants to contract that the act shall not apply to them (*Griffiths v. Lord Dudley, L. R., 9 Q. B. D. 357*).

The act expires at the end of the session of parliament next after the 31st of December, 1887, but actions commenced before that date are to continue.

As several treatises on the act have been issued, I do not think that I need enlarge upon it here; but no one should attempt to advise upon it without carefully studying the act itself.

CHAPTER IV.

OF THE LIMITATION OF ACTIONS EX DELICTO.

Reason for Limitation. I have so far treated of the wrongs independent, or quasi independent, of contract, of which the law takes cognizance; and I have shown how the law gives a remedy whenever it holds any act to be wrongful, in accordance with the maxim "*ubi jus ibi remedium est.*"

But although there is always a remedy, yet, for the sake of the peace of the kingdom, a man is not allowed to enforce his remedy at his own leisure, and after a long interval, in the course of which evidence may have been entirely swept away, which, if produced, might prove the defendant's innocence.

For this and other reasons, various statutes have been from time to time passed, which confine the right of action within certain periods after its commencement—periods which, as they differ in different actions, will be more particularly mentioned in the course of the second part of this work. At this stage, I propose to examine only such rules as apply to the limitation of all actions of tort.

Commencement of Period. RULE 19.—
When a statute limits the period within which

an action is to be brought for an act done or omitted, if the cause of action is a single act, or one which amounts to a trespass, the action must be brought within the prescribed period after the actual doing of the thing complained of. But if the cause of action is not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the damage (*Backhouse v. Bonomi*, 9 II. L. C. 503; *Saunders v. Edwards*, 1 Sid. 95).

The meaning of this rule is, that where the tort is the wrongful infringement of a right, then as that constitutes *per se* a tort, so the period of limitation commences to run immediately from the date of the infringement. But, on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then, as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

(1) Thus, where A. owned houses built upon land contiguous to land of B., C., and D.; and E., being the owner of the mines under the land of all these persons, so worked the mines that the lands of B. sank, and after more than six years' interval (the period of limitation in actions for causing subsidence), their sinking caused an injury to A.'s houses: Held, that A.'s right of action was not barred, as the

tort to him was the damage caused by the working of the mines, and not the working itself (*Backhouse v. Bonomi, sup.*).

(2) In an action for wrongful conversion of goods (which is an injury to a right) the facts were as follows:—A.'s furniture was seized under an execution by the sheriff, and eventually it was bought by A.'s friends, and left in his possession. A. enjoyed the use of it for more than six years, and died. Upon A.'s death it was claimed by these friends, and adversely by the widow, on the ground that the Statute of Limitations barred them from claiming it after they had allowed A. to keep it for six years: it was, however, held that the statute did not begin to run until the friends had claimed the furniture, for the tort was the wrongful conversion of the goods, which had only taken place when the widow refused to give them up (*Edwards v. Clay*, 28 *Bear.* 145; and see also *Spackman v. Foster*, *L. R.*, 11 *Q. B. D.* 99).

(3) Prior to 1866, a stream was conveyed by the defendants under their canal through two wooden tunnels, for which, in 1866, they substituted metal tunnels of less capacity, in consequence of which, after heavy rains, the stream in 1873 flooded the plaintiff's lands adjacent to the canal: Held, that the substitution of the smaller for the larger tunnels was, in its inception, an innocent act without either *injuria* or *damnum*, and only became tortious upon the subsequent flooding, and that the Statute of Limitations began to run from the time of the flooding in 1873 (*Devery v. Grand Junction Canal Co., Ir. Rep.*, 8 *C. L.* 511, following *Whitehouse v. Fellowes*, 10 *C. B.*, *N. S.* 765).

Concealed Tort. Sub-rule.—*Where a tort is fraudulently concealed by the defendant, and the plaintiff has no reasonable means of discovering it, the statute only begins to run from the date of the discovery (Gibbs v. Guild, L. R., 9 Q. B. D. 59).*

Disability. RULE 20.—*Contra non valentem agere nulla currit præscriptio.*

(*Where a person is under disability, the statute does not run.*)

Thus where persons, who would otherwise have the right to sue, are under certain disabilities, (as, for instance, coverture (in case of a woman), idiocy, or insanity,) the period of limitation does not commence to run until such disabilities have ceased (see 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16); but as to married women, see now the Married Women's Property Act, 1882.)

Exception. — No action of ejectment can be brought, and no distress or entry be made to recover land or rent, but within thirty years next after the right of action shall have accrued, notwithstanding that the person entitled to sue may be under some disability (37 & 38 Vict. c. 57, s. 5).

Disability subsequent to commencement of period no Bar. Sub-rule.—*Whenever the statute has once begun to run it continues to do so (Rhodes v. Smethurst, 4 M. & W. 42; Lafond v. Ruddock, 13 C. B. 819).*

Therefore, where the plaintiff is under no disability at the time the right of action accrued to him, but subsequently becomes under disability, and continues so until the expiration of the period of limitation, his right of action is barred; for the statute having once begun to run continues to do so (*Jackson v. Johnson*, 5 Cowen, 93; *Demarest v. Wynkoop*, 3 Johns. Chy. 129, 138).

Continuing Torts. RULE 21. Where the tort is continuing, the right of action is also continuing (*Whitehouse v. Fellowes*, 30 L. J., C. P. 305).

(1) Thus, where an action is brought against a person for false imprisonment, every continuance of the imprisonment *de die in diem*, is a new imprisonment, and therefore the period of limitation commences to run from the last and not the first day of the imprisonment (*Hardy v. Ryle*, 9 B. & C. 608).

(2) But where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of B.'s rights, a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. The fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled, even though there afterwards arises new and unforeseen damage from the existence of the ditch (*Kansas Pac. Ry. v. Muhlman*, 17 Kansas Rep. 224).

CHAPTER V.

OF THE MEASURE OF DAMAGES IN ACTIONS OF TORT.

THE principles which govern the measure of damages in actions of tort are very loose, and, indeed, as Mr. Mayne, in his excellent treatise, has pointed out, there are many cases of tort in which no measure can be given. It will be at once apparent, however, that, putting aside circumstances of aggravation or mitigation, the compensation to be awarded in respect of an injury to property is capable of being far more accurately calculated than in respect of injury to person or reputation; and, therefore, to some extent the principles of law are different in these two classes of cases, as will be seen from the following rules.

Damages for Personal Injury. RULE 22.
—There is no fixed rule for estimating damages in cases of injury to the person, reputation, or feelings, but the damages must be excessive and outrageous to warrant a new trial (*Huckle v. Money*, 2 Wils. 205; *Corkery v. Hickson*, Ir. R., 10 C. L. 175).

In the words of an American court, “In actions sounding in damages, where the law furnishes no rule of measurement save the discretion of the jury upon the evidence before them, courts will not dis-

turb a verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice, partiality, or corruption. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the verdict should be left as the jury found it" (*Miss. Cent. R. R. v. Caruth*, 51 *Miss. Rep.* 77).

(1) *False Imprisonment*. Thus, where some working men were unlawfully imprisoned for six hours only, being in the meantime well fed and cared for, and the jury nevertheless awarded 300*l.* to each of them, the court refused to set the verdict aside, on the ground that it seemed to them probable that the jury considered the importance of the right of personal liberty rather than the position of the plaintiffs.

(2) *Seduction*. And so in actions for seduction, "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example" (per *Ld. Eldon*, *Bedford v. M'Kowl*, 3 *Esp.* 120).

(3) *Assault*. So in actions for assault and battery, the court will seldom interfere; and the jury may take the circumstances into consideration, and aggravate or mitigate the damages accordingly.

Thus, to beat a man publicly is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*Tullidge v. Wade*, 8 Wils. 18).

(4) *Defamation*. So for defamation, the damages are almost wholly in the discretion of the jury (*Kelly v. Sherlock*, L. R., 1 Q. B. 686), and the court will seldom interfere with their verdict.

Exceptions.—The court will interfere with the verdict, if it appear that the jury assessed the damages under mistake or ill-feeling, or if they give the plaintiff more than he is entitled to, according to his own showing, or where the smallness of the amount shows that the jury have made a compromise, and, instead of deciding the issues, have agreed to find for the plaintiff for nominal damages only (*Hambleton v. Vere*, 2 Wms. Saund. 170; *Britton v. S. W. R. Co.*, 27 L. J., Ex. 355; *Falvey v. Stanford*, L. R., 10 Q. B. 54); or where the smallness of the amount shows that they have failed to take into consideration some essential element of damage (*Phillips v. L. & S. W. R. Co.*, L. R., 4 Q. B. D. 406).

Damages for Injuries to Property. It is extremely difficult to lay down any rules with regard

even to this branch of the subject, where it might be considered that some principles of estimation would apply, for the jury are allowed a much greater latitude than in questions of contract. However, it may be laid down as generally true that—

RULE 23.—The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses incurred by reason of such act.

(1) *Injury to Horse.* Thus, in the case of injury to a horse through the defendant's negligence; it has been held, that the measure of damages is the keep of the horse at the farrier's, the amount of the farrier's bill, and the difference between the prior and subsequent value of the horse (*Jones v. Boyce*, 1 Stark. 493; and see *Wilson v. Newport Dock Co.*, L. R., 1 Ex. 187).

(2) *Conversion.* So, in the conversion of chattels, the full market value of the chattel at the date of the conversion, is, *in the absence of special damage*, the true measure. Thus, where the plaintiff purchased champagne, lying at the defendants' wharf, at fourteen shillings per dozen, and resold it at twenty-four shillings to the captain of a ship about to leave England, and the defendants wrongfully refused to deliver up the wine, and converted it to their

own use, it was held, in an action of trover, that although the defendants had no knowledge of the sale, or of the purposes for which the plaintiff required delivery of the champagne, yet the plaintiff was entitled as damages to the price at which he had sold it (*France v. Gaudet*, *L. R.*, 6 *Q. B.* 199).

(3) *Trespass*. So, where coal has been taken by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*In re United Merthyr Coll. Co.*, *L. R.*, 15 *Eq.* 46).

(4) *Infringement of Patent*. And so the patentee of an invention applicable to part of a machine, who is himself a manufacturer, but who has been in the habit of licensing the use of his invention by other manufacturers on payment of a fixed royalty for each machine, can only claim from an infringer of his patent the ordinary royalty, and cannot claim in addition a manufacturing profit (*Penn v. Jack*, *L. R.*, 5 *Eq.* 81).

Consequential Damages. RULE 24.—Where any special damages have naturally, and in sequence, resulted from the tort, they may be recovered.

¶The difficulty in cases under this rule, is to determine what damages are the *natural* result, and what are too remote.

(1) *Loss of Business.* If, through the wilful or negligent conduct of another, one should receive corporal injury, whereby he is partially or totally prevented from attending to his business, the pecuniary loss suffered in consequence may be recovered. The most usual instances of this are to be found in actions against railway companies (*Phillips v. L. & S. W. Ry. Co., L. R., 4 Q. B. D. 406*).

(2) *Medical Expenses.* So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*Dixon v. Bell, 1 Stark. 289*; and see *Spark v. Heslop, 28 L. J., Q. B. 197*).

(3) *Loss of Property.* The plaintiff was travelling with other passengers in the carriage of a railway company, and on the tickets being collected, there was found to be a ticket short, and the plaintiff was wrongly charged by the collector with being the defaulter, and on his refusing to pay, was removed by the officers of the company, without unnecessary violence; it was held, in an action for assault, that the loss of a pair of race-glasses, which the plaintiff had left behind him in the carriage when he was removed, and which were not proved to have come into the possession of any of the company's servants, was not such a natural consequence of the assault as to be recoverable (*Glover v. L. & S. W. R. Co., L. R., 3 Q. B. 25*; and see as to remoteness *Sanders v. Stuart, L. R., 1 C. P. D. 326*).

(4) *Lord Campbell's Act*. The damages awarded under Lord Campbell's Act to the relatives of persons killed through the default of the defendant should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased (*Franklin v. S. E. R. Co.*, 3 H. & N. 211).

The jury cannot, in such cases, take into consideration the grief, mourning and funeral expenses to which the survivors were put. And this seems reasonable, for in the ordinary course of nature the deceased would have died sooner or later, and the grief, mourning and funeral expenses would have had to be borne then, if not at the time they were borne (*Blake v. Mid. R. Co.*, 21 L. J., Q. B. 233; *Dalton v. S. E. R. Co.*, 27 L. J., C. P. 227).

(5) *Injury to Trade*. So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*Gregory v. Williams*, 1 C. & K. 568).

(6) *Hiring Substitute*. In cases of wrongful conversion, if the owner of the chattel has been obliged to hire another in its place, the expense to which he has been put is recoverable (*Id.* 403).

(7) *Trespass*. Where the defendant was in charge of the plaintiff's house, and having one day lost the key, he effected an entrance through a window by means of a ladder, and showed some strangers through the house, it was held to be a trespass. For he was only authorized to enter in the ordinary way, and therefore, when some short time afterwards the

house was entered through the same window by thieves following his example, and many things stolen, it was held to be the consequence of the defendant's wrongful entry, and that he was liable for the loss of the things stolen (*Ancaster v. Milling*, 2 D. & R. 714). I, however, entertain little doubt that this case would not be followed in the present day, as the alleged damage cannot (with great submission to the learned judges who decided the case) be said to have been the natural result of the trespass.

(8) *Infection*. A cattle-dealer sold to the plaintiff a cow, fraudulently representing that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died; it was held that the plaintiff was entitled to recover, as damages, the value of all the cows, as their death was the natural consequence of his acting on the faith of the defendant's representation (*Mullet v. Mason*, L. R., 1 C. P. 559).

(9) In *Collins v. The Middle Level Commissioners* (L. R., 5 C. P. 279) the facts were as follows: By a drainage act the commissioners were to construct a cut with proper walls, gates and sluices to keep out the waters of a tidal river, and also a culvert under the cut to carry the drainage from the lands on the east to the west of the cut, *and to keep the same at all times open*. In consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and bursting its western bank flooded the adjoining lands. The plaintiff and

other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, re-opened it, and so let the waters through on to the plaintiff's lands to a much greater extent. It was held, that the commissioners were liable for the whole of the damage, as the natural result of their negligence.

(10) *Having been obliged to pay Damages to a Third Party.* So, again, a landlord, upon his tenant giving notice to quit, entered into a contract with a new tenant. Upon the expiration of the notice, the first tenant refused to quit, and the new tenant not being able to enter in consequence, brought an action against the landlord for breach of contract. It was held, that the landlord might recover, in an action against the tenant, the costs and damages to which he had been put in the action against him; for they were the natural and ordinary result of the defendant's wrong (*Bramley v. Chesterton*, 2 C. B., N. S. 605; and see *Tindal v. Bell*, 11 M. & W. 228).

Certain prospective Damages recoverable.

Sub-rule.—*The jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of the defendant; for the damages when given are taken to include all the hurtful consequences arising out of the wrongful act, unknown as well as known.*

Best, C. J. (in *Richardson v. Mellish*, 2 Bing. 240),

says, "When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be mischievous to say—it would be increasing litigation to say—'You shall not have all you are entitled to in your first action, but you shall be driven to a second, third, or fourth for the recovery of your damages.' " A corollary to this sub-rule is, that several actions cannot be brought in respect of the same injury. Therefore, where a bodily injury at first appeared slight, and small damages were awarded, but subsequently it became a very serious injury, it was held that another action would not lie; for the action having been once brought, all damages arising out of the wrong were satisfied by the award in the action (*Petter v. Beale*, 1 *Ld. Raym.* 339—692, and *Lamb v. Walker*, *L. R.*, 3 *Q. B. D.* 389, *Cockburn, C. J.*, *dissentiente*, and see also *Brunsdon v. Humphrey*, *L. R.*, 11 *Q. B. D.* 712).

Continuing Torts. *Exception.*—But if the tort be a continuing tort, the principle does not apply; for here a fresh cause of action arises *de die in diem*. Thus, in a continuing trespass, or nuisance, if the defendant does not cease to commit the trespass, or nuisance, after the first action, he may be sued until he does. Whether, however, there is a continuing tort, or merely a continuing damage, is often a matter of difficulty to determine. It is apprehended, however, that the true test is, whether the defendant is or is not bound to do or omit to do some act over and above the payment of the sum originally awarded

as damages. If he be bound to do or omit to do some act, and he neglects to do the act which he ought to do, or does the act which he ought not to do, and fresh damage results, then a new action may be brought. But if, on the other hand, the defendant is not bound to do or omit to do any act, and fresh damage results to the plaintiff from the old injuries, then no fresh action will be sustainable.

Aggravation and Mitigation. RULE 25. —The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*Davis v. L. & N. W. R. Co.*, 7 W. R. 105).

(1) *Seduction under Guise of Courtship.* In seduction, if the defendant have committed the offence under the guise of honourable courtship, that is ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person. “The jury did right in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been

dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (Wilmot, C. J., in *Tullidge v. Wade*, 3 Wils. 18).

(2) On the other hand, the previous loose or immoral character of the party seduced, is ground for mitigation. The using of immodest language for instance, or submitting herself to the defendant under circumstances of extreme indelicacy.

(3) *Plea of Truth in Defamation.* In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*Warwick v. Foulkes*, 12 M. & W. 508).

(4) *Plaintiff's bad Character in Defamation.* Evidence of the plaintiff's *general bad character* is allowed in mitigation of damages in cases of defamation; for, as is observed in Mr. Starkie's book on "Evidence," "To deny this, would be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant; a virtuous woman with the most abandoned prostitute." Such evidence cannot, however, be given, unless the facts on which the defendant relies to support his contention are expressly pleaded, so as to enable the plaintiff to meet them if he can (see Judgment of Cave, J., in *Scott v. Sampson*, L. R., 8 Q. B. D. 491, and cases there cited). But although evidence of general bad character is admissible if pleaded, evidence

of rumours and suspicions to the same effect as the defamatory matter is not admissible, as they only indirectly tend to affect the plaintiff's reputation (*ib.*).

(5) *Plaintiff's irritating Conduct in Defamation.* In *Kelly v. Sherlock* (*L. R.*, 1 Q. B. 686), the action was brought in respect of a series of gross and offensive libels contained in the defendant's newspaper. It appeared, however, that the first libel originated in the plaintiff having preached, and published in the local papers, two sermons reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew as their mayor, and the plaintiff had, soon after the libels had commenced, alluded, in a letter to another paper, to the defendant's paper as "the dregs of provincial journalism," and he had also delivered from the pulpit, and published, a statement to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault of which the plaintiff had been convicted. The jury having returned a verdict for a farthing damages, the court refused to interfere with the verdict on the ground of its inadequacy, intimating that although, on account of the grossness and repetition of the libels, the verdict might well have been for larger damages, yet it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to, and that the court ought not to interfere.

(6) *Imprisonment on False Charge of Felony.* In false imprisonment and assault, if the imprisonment

has been upon a false charge of felony, where no felony has been committed, or no reasonable ground for suspecting the plaintiff, this will be matter of aggravation.

(7) *Battery in consequence of Insult.* But if an assault and battery have taken place in consequence of insulting language on the part of the plaintiff, this will be ground for mitigating the damages (*Thomas v. Powell*, 7 C. & P. 807).

(8) *Insolent Trespass.* Where a person trespassed upon the plaintiff's land, and defied him, and was otherwise very insolent, and the jury returned a verdict for 500*l.* damages, the court refused to interfere, Chief Justice Gibbs saying, "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the mischief I have done'? Would that be a compensation?" (*Merest v. Harvey*, 5 Taunt. 441).

(9) *Wrongful Seizure.* And so where the defendant wrongfully seizes another's chattels, and exercises dominion over them; substantial damages will be awarded for the invasion of the right of ownership (*Baylis v. Fisher*, 7 Bing. 153).

(10) *Causing Suspicion of Insolvency.* And where the defendant took the plaintiff's goods under a false claim, whereby certain persons concluded that the plaintiff was insolvent, and that the goods had been seized under an execution, it was held that exem-

plary damages might be given (*Brewer v. Dent*, 11 M. & W. 629).

(11) *Return of Goods.* But where the defendant has returned the goods in the course of the action, and they have been received unconditionally by the plaintiff, merely nominal damages will be recoverable; unless the goods have been injured, or some special damage has been suffered (*Id.* 363).

Where Plaintiff is only Bailee. RULE 26.—Where the plaintiff is merely the possessory, but not the real owner, he may, as against a third party, recover the entire value of the property; but as against the real owner, only the value of his limited interest (*Heydon and Smith's case*, 13 Co. 68).

And it seems, therefore, that a *jus tertii* is not provable in reduction of damages, unless indeed the actual possession of the whole of the property was not in the plaintiff; for instance, where the owner of one sixteenth of a ship attempted to get damages for the whole value of it, he was not allowed to do so (*Dockwray v. Dickenson*, *Skin.* 640).

Presumption of Damage. RULE 27.—If a person who has wrongfully converted property, refuses to produce it, it will be pre-

sumed as against him to be of the best description (*Armory v. Delamirie*, 1 Sm. L. Ca. 315).

(1) Thus, in the above case, where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only, refused to produce it in order that its value might be ascertained, the jury were directed to assess the damages upon the presumption that the jewel was of the finest water, and of a size to fit the socket; for *Omnia præsumuntur contra spoliatorem*.

(2) So, where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*Mortimer v. Craddock*, 12 L. J., C. P. 166).

Damages in Actions of Tort founded upon Contract. RULE 28.—The damages in actions of tort founded upon contract, must be estimated in the same way as they are estimated in breach of contract; for a man cannot, by merely changing the form of his action, put himself in a better position (see *Chinery v. Viall*, 5 H. & N. 295; *Johnson v. Stear*, 33 L. J., C. P. 130).

Therefore, since in breaches of contract the damages limited to injuries which may reasonably be pre-

sumed to have been foreseen by both parties at the time of contracting, a man cannot sue for extraordinary, though consequential, damages, unless those damages were within the contemplation of both parties at the time of making the contract, either by express intimation (*Hadley v. Baxendale*, 9 *Ex.* 354; *Sanders v. Stewart*, *L. R.*, 1 *C. P. D.* 326), or by implication from the surrounding circumstances. (*Simpson v. L. & N. W. R. Co.*, *L. R.*, 1 *Q. B. D.* 274).

CHAPTER VI.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF
TORTS.

Definition. An injunction is an order of the Court of Appeal, or the High Court of Justice, or any division or judge of either of them, or of a county court,* restraining the commission or continuance of some act of the defendant.

Interlocutory or perpetual. Injunctions are either interlocutory or perpetual. An interlocutory injunction is a temporary injunction granted summarily, on motion founded on an affidavit, and before the facts in issue have been formally tried and determined. A perpetual injunction is one which is granted after the facts in issue have been tried and determined, and is given by way of final relief.

Injuries remediable by Injunction. RULE 29.—Wherever a legal right in property (or possibly in some cases where a mere *personal* right) exists, a violation of that right will be

* A county court has now, in actions within its jurisdiction, power to grant an injunction against a nuisance and to commit to prison for disobedience thereof (*Ex parte Martin*, L. R., 4 Q. B. D. 212; *Martin v. Bannister*, *ib.* 491).

prohibited in all cases where the injury is such as is not susceptible of being adequately compensated by damages, or at least not without the necessity of a multiplicity of actions for that purpose (*Aslatt v. Corporation of Southampton*, *L. R.*, 15 *Ch. D.* 143). But an injunction will not be granted where the injury is trivial in amount, or where the court, in its discretion, considers that damages should alone be given (see 21 & 22 Vict. c. 27; *Kino v. Rudkin*, *L. R.*, 6 *Ch. D.* 160; *Fritz v. Hobson*, *L. R.*, 14 *Ch. D.* 542).

(1) Thus, where substantial damages would be, or have been, recovered for injury done to land, or the herbage thereon, by smoke or noxious fumes, an injunction will be granted to prevent the continuance of the nuisance, for otherwise the plaintiff would have to bring continual actions (*Tipping v. St. Helens' Smelting Co.*, *L. R.*, 1 *Ch.* 66).

(2) And so where a railway company, for the purpose of constructing their works, erected a mortar mill on part of their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*Fenwick v. East London R. Co.*, *L. R.*, 20 *Eq.* 544).

(3) As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will

the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents in the neighbourhood in their homes or occupations, is a nuisance, and will be prohibited (*Soltan v. De Held*, 2 Sim. N. S. 133; *Harrison v. St. Mark's Church*, 15 Albany Law J. 248).

(4) So, where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises, an injunction will be granted *if the deprivation of light is such as would support a claim for substantial damages*. For, as was said by Sir W. Page Wood, V.-C., in *Dent v. Auction Mart Co.* (L. R., 2 Eq. 246), "Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord Eldon and Lord Westbury) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this, that where substantial damages would be given at law, as distinguished from some small sum of 5*l.*, 10*l.*, or 20*l.*, this court will interpose, and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour, have a right to purchase him out, without an act of parliament for that purpose." Sir G. Jessel, M. R., commenting upon

the above passage in *Aynsley v. Glover* (L. R., 18 Eq. 552), says: "It seems to me that that gives a reasonable rule, whatever the law may have been in former times. As I understand it, the rule now is—and I shall so decide in future, unless in the meantime the Appeal Court shall decide differently,—that wherever an action can be maintained at law, and really substantial damages, or perhaps I should say considerable damages (for some people may say that 20*l.* is substantial damages), can be recovered at law, there the injunction ought to follow in equity, generally, not universally, because I have something to add upon that subject." His lordship then, commenting upon the power given to him of awarding damages in substitution for an injunction, proceeded as follows: "It must be for the court to decide, upon consideration, to what cases the enactment (21 & 22 Vict. c. 27) should be held to apply. In the case of *The Carriers' Company v. Corbet* (2 Dr. & Sm. 355), we have an instance in which a judge has said that the act ought to apply in some cases. I had one before me, in which, there being comparatively a very trifling injury, although sufficient perhaps to maintain an injunction, comparing that with the injury inflicted upon the defendant, I thought, under the special circumstances, damages should be given instead of an injunction. I am not now going, and I do not suppose that any judge will ever do so, to lay down a rule which, so to say, will tie the hands of the court. The discretion being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of

each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff who is enabled—I do not like to use the word ‘extort,’ but—to obtain a very large sum of money from a defendant, merely because the plaintiff has a legal right to an injunction. I think the enactment was meant, in some sense or another, to prevent that course being successfully adopted. But there may be some other special cases to which the act may be safely applied, and I do not intend to lay down any rule upon the subject. If I had found by the evidence, that there was in this case a clear instance of very slight damage to the plaintiffs—that is, some 20*l.*, or 30*l.*, or 40*l.*, but still very slight—I should be disposed to hold that that was a case in which this court would decline to interfere by injunction, having regard to the new power conferred upon me by Lord Cairns’ Act to substitute damages for it” (and see also *Smith v. Smith*, *L. R.*, 20 *Eq.* 505; *Nat. Provincial Plate Glass Co. v. Prudential Ass. Co.*, *L. R.*, 6 *Ch. D.* 757; *Kino v. Rudkin*, *ib.* 160; and *Holland v. Worley*, *W. N.* 1884, p. 90).

(5) And so it has been laid down in an American court, that injunctions are to prevent irreparable mischief, and stay consequences that cannot be adequately compensated; their allowance is discretionary and not of right, calls for good faith in the plaintiff, and may be withheld if likely to inflict greater injury than the grievance complained of. It is an irreparable injury to create intolerable smells near the

homestead of a neighbour, or to undermine his house by excavations; to cut him off from the street by buildings or ditches, or otherwise destroy the comfortable, peaceful and quiet occupation of his homestead; also to break up his business, destroy its goodwill, and inflict damages that cannot be measured, because the elements of reasonable certainty are wanting in computing them (*Edwards v. Allouez, &c.*, 38 *Michigan Rep.* 46).

(6) Where there is a *mere trespass*, the court will not interfere, because the proper remedy is by an action for damages, or an action of ejectment. But if, in addition to the trespass, the trespasser is actually working the destruction of the estate (as by cutting down the timber or working a mine on it, or by building on it, or altering buildings on it), an injunction will be granted (see *Drewry on Injunctions*, 184 *et seq.*; and *Joyce on Injunctions*, 131).

(7) Where the sewage of a town was carried from a brook which, passing through a man's land, fed a lake also on such land, and the sewage thus discharged had for several years fouled the water of the lake, so that from being pure drinking water it gradually became quite unfit for drinking, an injunction was granted (*Goldsmid v. Tunbridge Wells Improvement Coms.*, *L. R.*, 1 *Eq.* 161).

(8) Again, deprivation of lateral or subjacent support, in cases where a jury would give considerable damages, is sufficient ground for an injunction.

(9) So, infringements of trade marks, copyright, and patent right, are peculiarly remediable by injunction; for not only are they continuing wrongs to

proprietary rights, but damages never could properly compensate the persons whose rights are invaded.

(10) On the other hand, it used to be held, that there is no injunction to restrain the publication of a personal libel (*Gee v. Pritchard*, 2 Swans. 402; *Clark v. Freeman*, 11 Bea. 112), for it does not concern property, and property was held to be the subject-matter of the jurisdiction; and probably it is still true "that, as a general rule, the court only interferes where there is some question as to property. I do not think that the interference of the court is absolutely confined to that now; there may be cases in which the court would interfere even when personal *status* is the only thing in question" (per Jessel, M. R., *Aslatt v. Corp. of Southampton*, L. R., 15 Ch. D. 148; *Judic. Act*, 1873, sec. 25, subs. 8). And where personal *status* was the chief question involved (the status of an alderman of a borough), the fact that the corporation possessed property, the management of which was vested in the mayor, *aldermen*, and *burgesses*, was held sufficient to give the court jurisdiction (*Aslatt v. Corp. of Southampton*, *sup.*). And so where a libel refers to property an injunction will be granted; as for instance where it is injurious to the plaintiff's trade (*Thomas v. Williams*, L. R., 14 Ch. D. 864, and *Thorley's Cattle Food Co. v. Massam*, *ib.* 764).

(11) The courts have held, that the writer of private letters has such a qualified property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees (*Drew. Inj.* 208; *Pope v. Curl*, 2 At. 342). And

that the party written to has such a qualified right of property in them as will entitle him, or his personal representatives, to restrain their publication by a stranger, unless such right is displaced by some personal equity, or by grounds of public policy (*Drew. Inj.* 309; *Granard v. Dunkin*, 1 *B. & Beat.* 207; *Percival v. Phipps*, 2 *V. & B.* 19).

Threatened Injury. RULE 30.—The court will not in general interfere until an actual tort has been committed; but it may, by virtue of its jurisdiction to restrain acts which when completed will result in a ground of action, interfere before any actual tort has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance or trespass (*Kerr, Inj.* 339).

So where a man threatens, or begins to do, or insists upon his right to do, certain acts, the court will interfere before any actual damage or infringement of any right has actually taken place, if the circumstances are such as to enable it to form an opinion as to the illegality of the acts complained of and the irreparable injury which will ensue (*Palmer v. Paul*, 2 *L. J., Ch.* 154; *Elliott v. N. E. R. Co.*, 10 *H. L. Cas.* 333). But if the injury is only problematical, according as other circumstances may or may not arise, or if there is no pressing need for an injunction, the court will not grant it until a tort has actually been committed (*Kerr, Inj.* 339).

Public Convenience does not justify the Continuance of a Tort. RULE 31.—It is no ground for refusing an injunction that it will, if granted, do an injury to the public. Even where parliament has authorized a public body to carry out a public work, that does not authorize the body to carry it out in such manner or place as will cause a nuisance.

Thus, in the case of *The Attorney-General v. Birmingham Corporation* (4 K. & J. 528), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, they could not do so on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations (see also *Spokes v. The Banbury Board of Health*, L. R., 1 Eq. 42; *Goldsmid v. Tunbridge Wells Improvement Coms.*, *sup.*; and *Hill v. Met. Asylums Board*, L. R., 6 App. Ca. 193). The same rule is observed in the United States (*Weir's Appeal*, 74 Penn. St. Rep. 230, and *Meigs v. Lester*, 23 New Jersey Eq. 199).

Mandatory Injunctions. RULE 32.—Where an injunction is asked, not merely prohibit-

ing an act, but ordering some act to be done, it in general requires a stronger case to be made out, than where a mere prohibition is asked for, especially where the injunction is interlocutory (*Deere v. Guest*, 1 *M. & C.* 516; *Durrell v. Pritchard*, *L. R.*, 1 *Ch.* 250; *Clark v. Clark*, *L. R.*, 1 *Ch.* 16).

(1) Thus, where a man has actually built a house which interferes with his neighbour's ancient lights, the court will not order him to take it down, except in cases in which extreme, or at all events very serious damage, would ensue if its interference were withheld; for in such case the injury to the defendant by the removal of his building would generally be out of all comparison to the injury to the plaintiff, and that is a consideration which ought to have great weight (see *Nat. Prov. Plate Glass Co. v. Prudential Ass. Co.*, *L. R.*, 6 *Ch. D.* 761).

(2) And so where an injunction was asked, ordering the defendants to pull down some new buildings, on two grounds, namely, 1st, that a right of way was obstructed by the new buildings; and, 2ndly, that the new buildings obstructed the light and air; it was held that no injunction ought to be granted, because, as was said by the Lord Justice Turner, "as to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked. As to the first ground, the right of way is not wholly stopped. The question is one merely of

the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, I think that the diminution of light and air to the plaintiff's houses is not such as would warrant us in granting the relief which is asked" (*Durrell v. Pritchard, sup.*).

Delay. RULE 33.—A person who has not shown due diligence in applying to the court for relief, will in general be debarred from obtaining an interlocutory injunction; but he will not be thereby debarred from obtaining an injunction at the hearing of the cause, unless his delay has been of such long duration as wholly to have deprived him of the right which he originally had (per Lord Langdale, in *Gordon v. Cheltenham R. Co.*, 5 B. 233).

PART II.

RULES RELATING TO PARTICULAR TORTS.

CHAPTER I.

OF DEFAMATION.

Oral or Written. Defamation may be either oral or written. In the former case, it is called slander,—in the latter, libel.

Definitions. RULE 1.—Libel is a false and malicious defamation of character expressed in writing, print, picture, or the like, tending to injure the reputation of another, and whereby that other is exposed to public ridicule, hatred, or contempt (Broom, 731).

The definition of slander is similar to that of libel, with the exception that the defamatory matter must be spoken and not written.

RULE 2.—In order to sustain an action for defamation, one of the two following state of facts must exist, namely :—

- (a) A false and disparaging statement expressed in writing, or print, published maliciously by the defendant of the plaintiff;
- (b) A false and disparaging verbal state-

ment spoken and published maliciously by the defendant of the plaintiff, whereby (except in certain cases hereinafter mentioned) actual damage has been caused to the plaintiff.

I.—Falsity. The words must be false, for truth is a good plea to an action for defamation (*Watkin v. Hall*, *L. R.*, 3 *Q. B.* 400; *Gourley v. Plimsoll*, *L. R.*, 8 *C. P.* 362; *Leyman v. Latimer*, *L. R.*, 3 *Ex. iv.* 15, 352).

II.—Disparagement. The words, writing, or picture, must be disparaging to be actionable (see *Sheaban v. Ahearne*, 9 *Ir. Rep.*, *C. L.* 412).

Sub-rule 1.—*Disparaging words are such as impute conduct or qualities tending to disparage or degrade the plaintiff* (*Digby v. Thompson*, 4 *B. & A.* 821); or to expose him to contempt, ridicule, or public hatred, or to prejudice his private character, or credit (*Gray v. Gray*, 34 *L. J.*, *C. P.* 45); or to cause him to be feared or avoided (*Ianson v. Stuart*, 1 *T. R.* 748; *Walker v. Brogden*, 19 *C. B.*, *N. S.* 165).

Thus, describing another as an infernal villain, is a disparaging statement sufficient to sustain an action (*Bell v. Stone*, 1 *B. & P.* 331); and so is an imputation of insanity (*Morgan v. Lingen*, 8 *L. T.*, *N. S.* 800); or insolvency, or impecuniousness (*Met. Saloon Omnibus Co. v. Hawkins*, 28 *L. J.*, *Ex.* 201; *Eaton v. Johns*, 1 *Dowl.*, *N. S.* 612); or of gross mis-

conduct (*Clement v. Chiris*, 9 B. & C. 176); or of cheating at dice (*Greville v. Chapman*, 5 Q. B. 744); or of ingratitude (*Cox v. Lee*, L. R., 4 Ex. 284).

So, reflections on the professional and commercial conduct of another are defamatory; as, for instance, to say of a physician, that he is a quack; and even to advertise pills as prepared by him (contrary to the fact) would probably be a libel (*Clark v. Freeman*, 11 Bear. 117). So, also, calling a newspaper proprietor "a libellous journalist," is defamatory (*Wakeley v. Cooke*, 4 Ex. 518).

Sub-rule 2.—*The first question for the jury is whether the words would be understood in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If, in the opinion of the jury, it would not be so read according to the primâ facie meaning of the language, then there is a farther question (if there is any evidence upon which it can be raised), whether there were facts known both to the person who framed the alleged libel, and to the person to whom it was published, which would lead the latter reasonably to put upon the document the construction, that, having a secondary defamatory sense, it was issued ironically, or otherwise than in the primary sense of the language (per Brett, L. J., Capital & Counties Bank v. Henty & Co., L. R., 5 C. P. D. 515).*

Where a secondary meaning is to be imputed, it is necessary that the facts should be known both to the person who indites the libel and to the persons to whom it is published; because, if facts are known to the latter persons from which

they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which, by the hypothesis, he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of anybody. Again, if there are facts known to the person who writes the libel which, if known to the persons who receive it, might reasonably lead them to suppose that it was used in an ironical sense, yet, if those facts are not known to the persons who receive it, that which is written, although written inadvertently or maliciously, could produce no effect upon their minds. Though the act might be negligent or wrongful on the part of the person writing the libel, the person who received it would, by the hypothesis, have no reasonable ground for reading it in any evil sense (*ibid*).

III.—Publication. Both written and spoken defamation must have been published in order to constitute an actionable wrong.

Sub-rule 3.—*The making known the libel or slander to any person, other than the object of such libel or slander, is publication in its legal sense.*

“Though, in common parlance, that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is indisputably in law a publishing” (*Rex v. Burdett*, 4 B. & Ald. 143).

• In civil actions it is immaterial—so far as the right to recover *some* damages is concerned—whether the libel was published intentionally, or only by accident, or through the negligence of the defendant (*Fox v. Broderick*, 14 *Ir. C. L. Rep.* 453; and *Shepherd v. Whitaker*, *L. R.*, 10 *C. P.* 502).

It is for the jury to find whether the facts, on which it is endeavoured to prove publication, are true; but for the court to decide whether those facts constitute a publication. (See *Street v. Licensed Victuallers' Society*, 22 *W. R.* 553; *Hart v. Wall*, *L. R.*, 2 *C. P. D.* 146).

IV.—**Malice.** Express or implied malice must exist in actions of defamation, but generally it is implied.

Sub-rule 4.—*In an action for defamation, the existence of express malice, that is to say, a conscious violation of the law to the prejudice of another (per Campbell, C. J., Ferguson v. Earl of Kinnoull, 9 Cl. & F. 321), is only a matter for inquiry, (1) when the words complained of were spoken on a justifiable occasion (Watkin v. Hall, L. R., 3 Q. B. 396; Speill v. Maule, L. R., 3 Ex. 232), and (2) where the defamation consisted in falsely impeaching a man's right to property,—a form of defamation commonly known as “slander of title” (Wren v. Weld, L. R., 4 Q. B. 730).*

The meaning of this is, that where a statement, writing, or picture, is false and defamatory, and was not published under such circumstances as to rebut

the presumption of malice, the law will conclude it to be malicious (*Baylis v. Lawrence*, 11 *A. & E.* 920).

Privileged Communication. Sub-rule 5.—

Where a communication is made bonâ fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either public or private, legal, moral, or social, such communication, if made to a person having a corresponding interest or duty, rebuts the inference of malice, and is privileged. (Laughton v. Bishop of Sodor and Man, L. R., 4 P. C. 495; Dawkins v. Lord Paulet, L. R., 5 Q. B. 94.) And where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made for a malicious or indirect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable ground for his belief. (Clark v. Molyneaux, L. R., 3 Q. B. D. 237; 47 L. J., Q. B. 230; 37 L. T. 694.)

Where in an action for libel the defendant insists that the publication is privileged, it is for the judge to rule whether the occasion creates a privilege. If the occasion creates such privilege, but there is

evidence of express malice (either from extrinsic circumstances or from the language of the libel itself), the question of express malice should be left to the jury (*Cook v. Wildes*, 5 *E. & B.* 328).

(1) *Parliamentary Proceedings.* Speeches in parliament are privileged (*Stockdale v. Hansard*, 9 *A. & E.* 1); and a faithful report in a public newspaper of a debate of either house of parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*Wason v. Walter*, *L. R.*, 4 *Q. B.* 73). Statements of witnesses before Parliamentary Committees are also privileged (*Goffen v. Donnelly*, *L. R.*, 6 *Q. B. D.* 307).

(2) *Judicial Proceedings.* Statements of a judge acting judicially, whether relevant or not, are absolutely privileged (*Scott v. Stansfield*, *L. R.*, 3 *Ex.* 220); and so are those of counsel, however irrelevant and however malicious (*Munster v. Lamb*, *L. R.*, 11 *Q. B. D.* 588). Solicitors acting as advocates have a like privilege (*ib.*, and *Mackay v. Ford*, 29 *L. J.*, *Ex.* 404). Statement of witnesses can never be the subject of an action (*Seaman v. Netherclift*, *L. R.*, 2 *C. P. D.* 53); and a military man giving evidence before a military court of inquiry, which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a court of justice (*Dawkins v. Rokeby*, *L. R.*, 7 *II. L.* 744; 23 *W. R.* 931). If the evidence is false, the remedy is by indictment (*Henderson v. Broomhead*, 28 *L. J.*,

Ex. 860). Fair reports of trials are also privileged (*Milissich v. Lloyds*, 46 *L. J.*, *C. P.* 404; *Lewis v. Levy*, 27 *L. J.*, *Q. B.* 282); but this privilege is not an absolute one, and the defendant will be liable for inserting in a paper even a fair report of a judicial proceeding, containing matter defamatory of the plaintiff, if he inserted the report out of malice (*Stevens v. Sampson*, *L. R.*, 5 *Ex. D.* 53; 49 *L. J.*, *Q. B.* 120; 28 *W. R.* 87). The privilege which the law thus affords to reports of judicial proceedings does not extend to reports containing matters of an obscene and demoralizing nature (*Steele v. Brannan*, *L. R.*, 7 *C. P.* 261). A fair report of an *ex parte* application before a police magistrate, if *finally* disposed of by him, is privileged; but *query* if it is so where the application is only a preliminary one (*Usill v. Hulls*, *L. R.*, 3 *C. P. D.* 319).

(3) *Reports of Meetings.* By sect. 2 of the Newspaper Libel and Registration Act, 1881, it is provided that "any report, published in any newspaper, of the proceedings of a public meeting, shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit." But the protection intended to be afforded by that section is not available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of, appeared,

a reasonable letter or statement of explanation or contradiction by, or on behalf of, such plaintiff or prosecutor.

(4) *Confidential Advice*. So advice given, in confidence, at the request of another, and for his protection, is privileged; and it seems that the presence of a third party makes no difference (*Taylor v. Hawkins*, 16 Q. B. 308; *Clark v. Molyneux*, *sup.*; *Robshaw v. Smith*, 38 L. T. 423; *Manby v. Witt*, 25 L. J., C. P. 294; 18 C. B. 544; *Lawless v. Anglo-Egyptian Co.*, L. R., 4 Q. B. 262); but it seems doubtful whether a voluntary statement is equally privileged (see *Corhead v. Richards*, 15 L. J., C. P. 278; and *Fryer v. Kinnersley*, 33 L. J., C. P. 96; but see *Davis v. Snead*, L. R., 5 Q. B. 608).

Thus the character of a servant given to a person requesting it, is privileged (*Gardiner v. Slade*, 18 L. J., Q. B. 313); and so, also, is the character of a person who states that she is a fit recipient of charity, given to, and at the request of, a person willing to bestow such charity, by the secretary of the Charity Organization Society (*Waller v. Loch*, L. R., 7 Q. B. D. 619).

The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*Cowles v. Potts*, 34 L. J., Q. B. 247). And it has been held by the Supreme Court of New Zealand that defamatory words *bonâ fide* spoken of a mayor at a towns meeting convened for the purpose of considering municipal business, but at which there were other persons present besides ratepayers, were privileged (*Hodges v. Glass*, 1 Ollivier, Bell & Fitzgeralds' (New Zealand) S. C. Reps. 66).

But imputations circulated freely against another in order to injure him in his calling, however bonâ fide made, are not privileged. Thus a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*Gilpin v. Fowler*, 9 *Ex.* 615).

The unnecessary transmission by a post office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*Williamson v. Freer*, *L. R.*, 9 *C. P.* 393). But, on the other hand, it has been held that where by the defendant's negligence a privileged communication, intended to be made to A., was in fact placed in an envelope directed to B., whereby the defamatory matter was published to B., yet the defendant was not liable, there being no malice (*Tompson v. Dashwood*, *L. R.*, 11 *Q. B. D.* 43).

(5) *Criticism.* Lastly: Fair and just criticisms of literary publications and works of art are privileged, provided the private character of the author or artist be not attacked (*McLeod v. Whately*, 3 *Car. & P.* 311; *Thompson v. Shackell*, *M. & M.* 187; *Latimer v. Western Morning News*, 25 *L. T.* 44; *Henwood v. Harrison*, *L. R.*, 7 *C. P.* 606).

Tradesmen's advertisements are within the meaning of literary publications (*Paris v. Lery*, 30 *L. J.*, *C. P.* 1).

So, too, fair criticism is allowed upon the public life of public men, or men filling public offices; such as the conduct of public worship by clergymen (*Kelley v. Tinling*, *L. R.*, 1 *Q. B.* 699): provided such criticism does not touch upon their private lives

(*Gathercole v. Miall*, 15 *M. & W.* 319; see, also, *Odger v. Mortimer*, 28 *L. T.* 472).

And in the United States it has been laid down, that while a citizen has the right to criticise the official conduct of a public man with satire and ridicule, he cannot in such criticism attack his private character (*Hamilton v. Eno*, 10 *N. Y. Weekly Dig.* 403).

So the fair criticism on a matter of public and national importance (*Henwood v. Harrison*, *L. R.*, 7 *C. P.* 606), or on the conduct of persons at a public meeting (*Davis v. Duncan*, *L. R.*, 9 *C. P.* 396), is privileged.

V.—Actual Damage where Defamation is spoken. In actions of slander (save in the cases hereinafter mentioned), but not of libel, it is necessary to prove damage, and unless the plaintiff can do so he cannot succeed.

Sub-rule 6.—*In oral defamation, as in other torts, where damages must be proved, the loss complained of must be such as “might fairly and reasonably have been anticipated and feared would follow from the speaking of the words”* (*Lynch v. Knight*, 9 *H. of L. C.* 517).

It was at one time considered that the special damage must be the legal and natural consequence of the words spoken, and, consequently, that it was not sufficient to sustain an action of slander to prove a mere wrongful act of a third party induced by the slander, such as that he had dismissed the plaintiff from his employment, before the end of the term for which they had contracted (*Vicars v. Wilcocks*, 2 *Sm. L. C.* 534). However, that view of the law can

no longer be considered accurate, having been dissented from in several cases, particularly in *Lumley v. Gye* (2 *E. & B.* 216), and *Lynch v. Knight* (*sup.*). In the latter case Lord Wensleydale said:—"I am much influenced by the able reasoning of Mr. Justice Christian (one of the judges in the court below). I strongly incline to agree with him, that to make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, as we might think ought to follow. . . . In the case of *Vicars v. Wilcocks*, I must say that the rules laid down by Lord Ellenborough are too restrictive. That which I have taken from Mr. Justice Christian seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord Ellenborough puts an absurd case, that a plaintiff could recover damages for being thrown into a horse-pond as a consequence of words spoken; but, I own, I can conceive that, when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime."

/ *Examples of Actual Damage.*—(1) Words were spoken imputing unchastity to a woman, and by

reason thereof she was excluded from a private society and congregation of a sect of Protestant Dissenters, of which she had been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature : Held, that such a result was not such special damage as would render the words actionable (*Roberts v. Roberts*, 33 *L. J.*, *Q. B.* 249 ; and see *Chamberlain v. Boyd*, *L. R.*, 11 *Q. B. D.* 407).

(2) Action by husband and wife for slander, imputing incontinency to the wife, alleging that by reason thereof the wife became ill and unable to attend to her necessary affairs and business, and that the husband was put to expense in endeavouring to cure her : Held, that the declaration showed no cause of action (*Allsopp v. Allsopp*, 5 *Hurls. & Norm.* 534).

(3) Where the wife, in consequence of words imputing want of chastity to her, ceased to receive the hospitality of divers friends, and especially of her husband, it was held that such a loss was the reasonable and natural consequence of such slander (*Davies v. Solomon*, *L. R.*, 7 *Q. B.* 112 ; 41 *L. J.*, *Q. B.* 10 ; 20 *W. R.* 167). It is, however, difficult, on grounds of common sense, to differentiate such damage from the damage referred to in examples 1 and 2.

(4) An action brought by a trader, alleging that defendant falsely and maliciously spoke and published of his wife, who assisted him in his business, certain words accusing her of having committed adultery upon the premises where he resided and

carried on his business, whereby he was injured in his business, and certain specified and other persons who had previously dealt with him ceased to do so, is maintainable on the ground that the injury to his business is the natural consequence of the words spoken: Held, also, that the special damage might be proved by general evidence of the falling off of his business, without showing who the persons were who had ceased to deal with him, or that they were the persons to whom the statements were made (*Riding v. Smith*, *L. R.*, 1 *Ex. Div.* 91; 45 *L. J.*, *Ex.* 281; 24 *W. R.* 487).

There is a custom in the City of London Courts enabling a woman whose chastity had been slandered, to maintain an action, though she can prove no special damage.

Imputation of Crime, Unfitness for Society and Misconduct in Business. There are certain exceptions to the rule that verbal slander must have caused actual damage in order to be actionable. In fact some slanders import such defamation as must be naturally prejudicial, and therefore in such cases the law presumes a *damnum*.

Exception (1). A false oral imputation made against another, of the commission of an indictable offence, is a sufficient *damnum* of itself (*Webb v. Beavan*, *L. R.*, 11 *Q. B. D.* 609).

Thus the words "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable (*Jones v. Herne*, 2 *Wils.* 89). And it is immaterial that the charge was made at a time when it could

not cause any criminal proceedings to be instituted. Thus the words "You are guilty" [innuendo of the murder of D.] are, after the verdict of not guilty, a sufficient charge of murder to support an action (*Peake v. Oldham*, *W. Bl.* 960). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (per Ellenborough in *Thompson v. Barnard*, 1 *Camp.* 48; and per Kenyon, *Christie v. Cowell*, *Peake*, 4).

The allegation, too, must be a direct charge of crime. Thus saying of another, that he had forsworn himself is not actionable, without showing that the words had reference to some judicial inquiry (*Holt v. Scholefield*, 6 *T. R.* 691). So where a declaration alleged that the defendant called the plaintiff a "welcher" (meaning a person who dishonestly appropriates and embezzles money deposited with him); and the evidence showed that a "welcher" is a person who receives money which has been deposited to abide the event of a race, and who has a pre-determined intention to keep the money for himself, it was held that, as the word did not necessarily impute the offence of embezzlement, it did not imply an indictable offence, and so was not actionable (*Blackman v. Bryant*, 27 *L. T.* 491, *Ex.*).

Calling a person a "swindler" has been held in Ireland not to be actionable, in the absence of an allegation that the word was spoken in reference to some office, trade or profession (*Black v. Hunt*, 2 *Ir. L. R.*, *Q. B. D.* 10).

Exception (2). False words tending to cause exclusion from society are actionable per se.

Thus to allege the *present* possession of an infectious, or even a venereal, disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (see *Carslake v. Mappedrum*, 2 *T. R.* 473; *Bloodworth v. Gray*, 7 *M. & G.* 334). Yet, with curious inconsistency, our law gives no relief to a woman who is falsely accused of fornication, unless actual exclusion from general society be specifically proved (see page 123, *sup.*).

Exception (3). Words imputing to a man misconduct in, or want of some necessary qualification for, his office or trade, are actionable per se; although the office or trade is not one of which the court can take judicial notice (*Foulger v. Newcomb*, *L. R.*, 2 *Ex.* 327).

Thus words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable per se (*Irwin v. Brandwood*, 2 *H. & C.* 960; 33 *L. J.*, *Ex.* 257).

So where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*Gallway v. Marshall*, 23 *L. J.*, *Ex.* 78).

The American courts have held that to say of a magistrate "he is a damned fool of a justice," is actionable per se (*Spiering v. Andrea*, 18 *Am. Law Reg. (N. S.)* 186, 188, n.).

So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*Southee v. Denning*, 17 *L. J.*, *Ex.* 151; 1 *Ex.* 196).

Or of an attorney that “he deserves to be struck off the roll” (*Phillips v. Jansen*, 2 *Esp.* 624). But it is not ground for an action to say “he has defrauded his creditors, and been horsewhipped off the course at Doncaster,” because this has no reference to his profession (see also *Jenner v. A’Beckett*, *L. R.*, 7 *Q. B.* 11; 41 *L. J.*, *Q. B.* 14; and *Miller v. David*, *L. R.*, 9 *C. P.* 118). But this seems a curious refinement.

Repeating Defamation. RULE 3.—Whenever an action will lie for slander or libel, it is of no consequence that the defendant was not the originator, but merely a repeater, or printer and publisher of it; and if the damage arise simply from the repetition, the originator will not be liable (*Parkins v.* 1 *Hurl. & Coll.* 153; *Watkin v. Hall*, *L.* 3 *Q. B.* 396); except (1) where the originator had authorized the repetition (*Kendillon v. Maltby*, *Car. & M.* 402); and (2) where the words are spoken to a person under a moral duty or obligation to communicate them to a third person (*Derry v. Handley*, 16 *L. T.*, *N. S.*, *Q. B.* 263).

(1) In that case, Cockburn, C. J., observes, “Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard

to some third person, as when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters, the slanderer cannot excuse himself by saying, 'True, I told the husband, but I never intended that he should carry the matter to his wife.' In such case the communication is privileged, and an exception to the rule to which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

(2) But where A. slandered B. in C.'s hearing, and C. without authority repeated the slander to D., *per quod* D. refused to trust B.: it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorized repetition and not of the original statement (*Ward v. Weeks*, 4 M. & P. 808).

(3) *Printing Slander*. So the printing and publishing by a third party of oral slander (not *per se* actionable), renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action, although the originator, who merely *spoke* the slander, will not be liable (*McGregor v. Thwaites*, 3 B. & C. 35).

(4) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot exonerate himself by naming the latter. For "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit

for veracity or not” (per Best, J., *Crespigny v. Wells*, 5 Bing. 403).

Newspaper Proprietors. RULE 4.—In an action for libel against the proprietor or editor of any newspaper or other periodical, the defendant may plead that the libel was inserted without malice and without gross negligence; and that at the earliest subsequent opportunity he inserted in such or some other publication a full apology; or, if such publication was published at intervals exceeding a month, that he offered to publish such apology in any paper the plaintiff might name. And upon filing such plea, the defendant may pay a sum into court by way of amends (6 & 7 Vict. c. 96, s. 2). See *Hawkesley v. Bradshaw*, L. R., 5 Q. B. D. 22.

Limitation. RULE 5.—An action for slander must be commenced within two years next after the cause of action arose, and an action for libel within six years.

CHAPTER II.

OF MALICIOUS PROSECUTION.

Definition. RULE 6.—Malicious prosecution consists in the malicious institution against another, of criminal, or bankruptcy, or liquidation proceedings, without reasonable or probable cause (see *Churchill v. Siggers*, 3 *Ell. & Bl.* 937; *Johnson v. Emerson*, *L. R.*, 6 *Ex.* 329; and *Quartz Hill, &c. Co. v. Eyre*, *L. R.*, 11 *Q. B. D.* 674).

RULE 7.—In order to support an action for malicious prosecution, the plaintiff must show (1) malice; (2) want of probable cause on the part of the defendant; (3) that the former proceedings were determined in his favour; and (4) that he has suffered damage by reason of such prosecution.

I.—**Malice.** Malice, as I explained in the last chapter, is either express or implied.

Sub-rule 1.—*In an action of malicious prosecution,*

malice is generally implied, upon proof of absence of reasonable and probable cause for instituting the prosecution complained of (Johnstone v. Sutton, 1 T. R. 544).

(1) Thus, where the defendant, at the time of the prosecution of the plaintiff, showed that he had a consciousness of the innocence of the accused, it was held evidence of malice. (See *Shrosbery v. Osmaston*, 37 L. T. 792.)

(2) So, too, where one is assaulted justifiably, and he institutes criminal proceedings for the assault; if, in the opinion of the jury, he commenced such proceedings, knowing that he was wrong and had no just cause of complaint, malice may be presumed (*Hinton v. Heather*, 14 M. & W. 131).

(3) So, too, it may be presumed, if it be shown that the defendant *knew* that the plaintiff against whom he had charged a theft, took the goods under an erroneous belief that he had a legal right to do so (*Huntley v. Simpson*, 27 L. J., Ex. 134).

(4) So, where the prosecutor of another says that he is prosecuting him in order to stop his mouth, it is evidence that he knew him to be innocent, and therefore that the prosecution was malicious (*Heslop v. Chapman*, per Maule, J., 23 L. J., Q. B. 49).

(5) Malice may be implied in a corporation, notwithstanding its want of individuality (*Edwards v. Midland Rail. Co.*, L. R., 7 Q. B. D. 287).

Subsequent Malice. Sub-rule 2.—*A prosecution, though in the outset unmalicious, may become*

malicious, if the prosecutor, having acquired positive knowledge of the innocence of the accused, proceeds malo animo in the prosecution (per Cockburn, C. J., *Fitz John v. MacKinder*, 30 L. J., C. P. 264).

And where a person has not instituted, but only adopts and continues proceedings, the same principle applies (*Weston v. Beeman*, 27 L. J., Ex. 57).

Thus where, through the defendant's perjury, the judge of a county court, believing the *plaintiff* to have perjured himself, committed him for trial, and bound over the defendant to prosecute him, which he did, but unsuccessfully; it was held that the plaintiff had a good cause of action against the defendant; because, although the defendant had not initiated the proceedings, yet there was no reason why he should have followed them up; for he might have discharged his recognizance by appearing and telling the truth (*Fitz John v. MacKinder*, 30 L. J., C. P. 264).

II.—Want of probable Cause. Although, as we have seen, malice may be implied from want of probable cause, in no case can the want of probable cause be implied from the mere existence of malice (*Johnstone v. Sutton*, 1 T. R. 544). In *Taylor v. Williams* (6 Bing. 186), Tindal, C. J., remarks, "Malice alone is not sufficient, because a person actuated by the plainest malice may, nevertheless, have a justifiable reason for prosecution."

The existence of reasonable and probable cause is a question of law for the judge, the jury having ascertained the facts, if the facts are in dispute

(per. Kelly, C. B., *Perryman v. Lister*, L. R., 3 Ex. 202).

What is reasonable and probable cause “is a mere question of opinion, depending entirely upon the view which the judges may happen to take of the circumstances in each particular case” (per Kelly, C. B., in *Perryman v. Lister*, *sup.*). “There must be a reasonable cause, such as would operate on the mind of a discreet man; there must be also a probable cause, such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge, otherwise there is no probable cause for him” (*Broad v. Ham*, 5 Bing. N. C. 725; *Kelly v. Mid. G. W. Ry. of Ireland*, 7 Ir. Rep., C. L. 8, Q. B.).

Counsel's Opinion. A man cannot shield himself from the results of a malicious prosecution, on the ground that it was instituted under the advice of counsel. “It would be a most pernicious practice,” remarks Heath, J., “if we were to introduce the principle that a man, by obtaining the opinion of a counsel, by applying to a weak man or an ignorant man, might shelter his malice in bringing an unfounded prosecution” (5 *Taunton*, 283).

Onus of Proof. The onus of showing that there was not reasonable and probable cause rests, in the first instance, on the plaintiff; and though it is a negative, it is a negative essential to the plaintiff's case, and the defendant is entitled to the benefit of the plaintiff's failure to establish that negative (see Judgment of Lord Colonsay in *Lister v. Perryman*,

L. R., 4 *H. L.* 521; *Walker v. S. E. R. Co.*, *L. R.*, 5 *C. P.* 640; *Hicks v. Faulkner*, *L. R.*, 8 *Q. B. D.* 167; and *Abrath v. N. E. R. Co.*, *L. R.*, 11 *Q. B. D.* 440).

III.—The former Proceedings must have been determined in the Plaintiff's favour. It is necessary to show that the proceeding alleged to have been instituted maliciously, and without reasonable or probable cause, has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*Baseby v. Mathews and wife*, *L. R.*, 2 *C. P.* 684).

This rule applies equally to the case where the plaintiff has been summarily convicted under a statute which gives no power of appeal (*Baseby v. Mathews*, *sup.*).

IV.—Damage. “In order to support an action for malicious prosecution or suit, it is necessary to show some damage resulting to the present plaintiff from the former proceeding against him. This may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty; or damage to his property, as where he is obliged to spend money in necessary charges to acquit himself of the crime of which he is accused” (*Mayne's Treatise on Damages*, p. 345).

In this case, as in slander, the damages must be the reasonable and probable cause of the malicious prosecution, and not too remote.

Non-liability of Complainant for Acts of Magistrate. RULE 8.—If a person, *bonâ fide*, makes a complaint to a magistrate, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who complained to the magistrate is not responsible for the magistrate's error (*Wyatt v. White*, 29 *L. J.*, *Ex.* 193). But if there be no reasonable and probable cause for suspecting that a felony has been committed, and the defendant makes a specific charge of felony, it is otherwise.

Thus, if one, without reasonable and probable cause, causes a search warrant to issue against the plaintiff, he is liable to an action ; but if he merely goes before a magistrate and *bonâ fide* puts before him reasonable grounds of suspicion, and the magistrate thereupon, in the exercise of his discretion, issues the warrant, no action lies (*Cooper v. Booth*, 3 *Esp.* 144).

CHAPTER III.

OF FALSE IMPRISONMENT AND MALICIOUS ARREST.

Definition of False Imprisonment. RULE 9.—False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient legal authority (*Bird v. Jones*, 7 Q. B. 743).

Moral Restraint. Imprisonment does not imply incarceration, but any restraint by force or show of authority. For instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*Grainger v. Hill*, 4 Bing. N. C. 212; see *Harrey v. Mayne*, 6 Ir. R., C. L. 417).

But some total restraint there *must* be, for a partial restraint of locomotion in a particular direction, (as by preventing the plaintiff from exercising his right of way over a bridge,) is no imprisonment; for no restraint is thereby put upon his liberty (*Bird v. Jones*, *sup.*).

The rules which apply to imprisonments by private persons, and those which apply to imprisonments by

judges and other magistrates, are necessarily different.

It will be therefore more convenient to consider them separately.

SECTION 1.

Of Imprisonments by Private Persons and Constables.

General Immunity. RULE 10.—No person can in general arrest or imprison another without a legal, and legally executed, warrant.

Exceptions. (1) *Bail*.—A person who is bail for another, may always arrest and render him up in his own discharge (*Exp. Lyne*, 3 *Stark*. 132).

(2) *Felons*.—A treason or felony having *been actually committed*, a private person may arrest one *reasonably* suspected by him; but the suspicion must not be mere surmise (*Beckwith v. Philby*, 6 *B. & C.* 635). So a person may arrest another in order to prevent him from committing a felony.

A constable may, however, arrest, merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer; and even though it should turn out eventually that no felony has been committed he will not be liable (*Marsh v. Loader*, 14 *C. B.*, *N. S.* 535; *Griffin v. Coleman*, 28 *L. J.*, *Ex.* 134).

The suspicion, however, must be a reasonable one, or the constable will be liable. Thus, a person told the defendant, a constable, that a year previously, he had had his harness stolen, and that he now saw it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*Hogg v. Ward*, 27 L. J., Ex. 443).

Where one man falsely charges another with having committed a felony, and a constable, at and by his direction, takes that other into custody, the party making the charge, and not the constable, is liable (*Davies v. Russell*, 2 M. & P. 607). "It would be most mischievous," Lord Mansfield remarks, "that the officer should be bound first to try, and at his peril exercise, his judgment as to the truth of the charge. He that makes the charge alone is answerable" (*Griffin v. Coleman*, 4 H. & N. 265).

(3) *Breakers of Peace*.—A private person may and ought to arrest one committing, or about to commit, a breach of the peace, but not if the affray be over and not likely to recur (*Timothy v. Simpson*, 1 Cr., M. & R. 757).

But it seems that a constable may arrest, even after the affray (so that it be immediately after), in order

to take the offender before a magistrate (*R. v. Light*, 27 *L. J.*, *M. C.* 1).

(4) *Night Offenders*.—Any person may arrest and take before a justice one *found committing* an indictable offence between 9 p.m. and 6 a.m. (14 & 15 Vict. c. 19, s. 11).

(5) *Malicious Injuries*.—The owner of property, his servant, or a constable, may arrest and take before a magistrate any one *found committing* malicious injury to such property (14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97).

(6) *Offering Goods for Pawn*.—A private person, to whom goods are offered for sale or pawn, may, if, he has reasonable ground for suspecting that an offence against the Larceny Amendment Acts (24 & 25 Vict. c. 96; 35 & 36 Vict. c. 93, s. 34) has been committed with respect to them, arrest the person offering them, and take him and the property before a magistrate.

(7) *Vagrants*.—Any person may arrest, and take before a magistrate, one found committing an act of vagrancy (5 Geo. 4, c. 83).

N.B. Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and many other acts, for which I must refer to the 4th section of the Act.

(8) A constable or churchwarden may apprehend, and take before a magistrate, any person disturbing divine service (14 & 15 Vict. c. 19, s. 11).

In other cases, to justify an arrest, the warrant, writ or order of some competent court must be

obtained, and the person arresting must have it with him at the time, ready to produce if demanded (*Gilliard v. Loxton*, 31 *L. J.*, *M. C.* 123).

Under the 4th, 5th and 7th exceptions, it is no excuse to prove commission of the offence immediately before the arrest, for the arrest must be made *in the course of the commission* of the offence (see *Simmon v. Milligan*, 2 *C. B.* 533).

Particular Exceptions.—In London, the owner of property may arrest any one *found* committing any indictable offence, or misdemeanor in respect to it, punishable upon summary conviction.

Most private Railway Acts, too, give power to officers of the company to detain unknown offenders against the Act.

Officers in the army may arrest a deserter, and ship masters have special powers of imprisoning crew and passengers.

Special powers, too, are frequently given to the police of certain towns and cities, by their Local Acts.

SECTION 2.

Of Imprisonment by Judicial Officers.

RULE 11.—No judicial officer, invested with authority to imprison, is liable to an action for a wrongful imprisonment, unless he acted beyond his jurisdiction (*Doswall v. Impey*, 1 *B. & C.* 169; *Kemp v. Neville*, 10 *C. B.*,

N. S. 523): not even though he imprisons the plaintiff maliciously (*Reon v. Smith*, 18 *C. B.* 126; *Henderson v. Broomhead*, 4 *H. & N.* 569; *Dawkins v. Paulet*, *L. R.*, 5 *Q. B.* 94). In order to constitute a jurisdiction, such officer must have before him some suit, complaint, or matter in relation to which he has authority to inflict imprisonment or arrest.

(1) In the case of *Scott v. Stansfield* (*L. R.*, 3 *Ex.* 220), which, though an action of slander, will very well repay a careful perusal, Kelly, *C. B.*, remarks, "It is essential in all courts, that the judges, who are appointed to administer the law, should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury, whether a matter, on which he has commented judicially, was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. It is impossible to over-estimate the inconvenience of such

a result. For these reasons I am most strongly of opinion that no such action as this can under any circumstances be maintainable" (a).

(2) Where a court has jurisdiction of a matter before it, but acts erroneously, the parties suing (unless they acted maliciously), the court itself, and the officers executing its orders or warrants, will be protected from any action at the suit of a person arrested. But where it has no jurisdiction all these parties may be liable (*Comyn, Dig. tit. County Court*, 8; *Houlden v. Smith*, 14 Q. B. 841; *West v. Smallwood*, 3 M. & W. 421; *Wingate v. Waite*, 6 M. & W. 746; *Brown v. Watson*, 23 L. T. 745).

(3) So where a magistrate acts without those circumstances which must concur to give him jurisdiction he will be liable (*Morgan v. Hughes*, 2 T. R. 225). But an information brought before a magistrate, charging an offence within his cognizance, gives him jurisdiction (*Cave v. Mountain*, 1 M. & G. 257).

Primâ facie Jurisdiction. Sub-rule 1.—A

(a) Whether a magistrate would be equally exempted from liability in cases where he had acted maliciously, does not seem to have been decided. It will at once appear that the judgment of the Chief Baron, which I have cited at considerable length on account of its lucid enunciation of the principles on which this exception is based, is broad enough to include actions brought against a justice of the peace. At the same time, it must be admitted the first section of Jervis' Act (11 & 12 Vict. c. 44), as has been pointed out by Mr. Roscoe in his *Law of Nisi Prius Evidence*, would seem to imply that such an action could be supported. There the matter rests, but I confess I have little doubt, should the question ever arise, that, provided he acts within his jurisdiction, a magistrate is no more answerable (by action, that is to say) for a malicious act, than is a judge of a county court or of the High Court. In this opinion the learned author above cited seems to concur.

judge of an inferior court, having a primâ facie jurisdiction over a matter, is not responsible for a false imprisonment committed on the faith of such primâ facie jurisdiction, if, by reason of something of which he could have no means of knowledge, he really has no jurisdiction (Calder v. Halkett, 3 Moore, P. C. C. 28).

Thus if, through an erroneous statement of facts, a person be arrested under process of an inferior court, for a cause of action not accruing within its jurisdiction, no action lies against the judge or officer of the court, but against the plaintiff only (*Ollett v. Bessey*, 2 *W. Jones*, 214).

Contempt of Court. Sub-rule 2.—*The superior courts of law and equity, have jurisdiction to punish by commitment for any insult offered to them, and any libel upon them, or any contemptuous or improper conduct committed by any person with respect to them; but inferior courts of record have power only to commit for contempts committed in court.*

(1) During the pendency of a suit in a superior court, the publisher of a newspaper commits a contempt, if he publishes extracts from affidavits with comments upon them (*Tichborne v. Mostyn*, *L. R.*, 7 *Eq.* 56).

(2) Where an indictment has been removed into the Queen's Bench Division, and a day appointed for trial, the holding of public meetings, alleging that the defendant is not guilty, and that there is a conspiracy against him, and that he cannot have a fair trial, is a contempt of court (*Onslow's and Whalley's case*, *Reg v. Castro*, *L. R.*, 9 *Q. B.* 219).

(3) A solicitor is guilty of a contempt of court in writing, for publication, letters tending to influence the result of a suit (*Davis v. Eley*, *L. R.*, 7 *Eq.* 49).

(4) It seems that the judge of a county court has power only to commit for contempts committed before the court and whilst it is sitting. (See *R. v. Leroy*, *Weekly Notes*, Feb. 8, 1873.)

(5) A justice of the peace may commit one who calls him, in court, a liar (*Rex v. Revel*, 1 *Str.* 421).

Justices. Sub-rule 3.—*If a felony, or breach of the peace, be committed in view of a justice, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But, if he be not present, he must issue his written warrant to apprehend the offender* (2 *Hale*, *Pl. Cr.* 86).

Protection of Justices acting without Jurisdiction. RULE 12.—Where a justice acts in a matter without any, or beyond his, jurisdiction, a person injured by any conviction or order issued by such justice in such matter cannot maintain an action in respect thereof, until such conviction shall have been quashed by the proper tribunal in that behalf; nor for anything done under a warrant followed by a conviction or order, until such conviction be quashed; nor at all for anything done under a warrant for an indictable offence.

if a summons had been previously served and not obeyed. (See 11 & 12 Vict. c. 44.)

Constables executing the warrants of justices issued without jurisdiction are specially protected by 24 Geo. 2, c. 44, ss. 6, 8, from any action, unless they have refused for six days after written demand to produce the warrant.

It may be also observed that, by sect. 9, a month's notice is required to be given before commencing an action against a justice for any act done in the execution of his office; and by 11 & 12 Vict. c. 44, s. 11, if after such notice, and before the commencement of the action, the justice tender a sum of money in amends, then if the jury shall be of opinion that such sum is sufficient, they shall give their verdict for the defendant. A justice acting maliciously is nevertheless entitled to notice, and to tender amends (*Leary v. Patrick*, 15 Q. B. 272).

Definition of Malicious Arrest. RULE 13.
—Malicious arrest consists in wilfully putting the law in motion to effect the arrest, under civil process, of another without cause.

RULE 14.—Any person maliciously causing the arrest of another is liable to an action.

By a malicious act is not only meant a wicked and spiteful act, but also a deliberately intentional wrong, although done without any actual spite or ill-feeling.

(1) Therefore, if by a false statement or suppression a man obtains the arrest of another, he is liable to an action.

(2) So a false affidavit whereby a judge's order is obtained for the arrest of an absconding debtor, renders the deponent liable to the person arrested.

Habeas Corpus. Such are the leading principles of law relating to deprivation of liberty; it remains to notice a peculiar and unique remedy which the law affords in addition to that by action. I mean the writ of habeas corpus ad subjiciendum.

RULE 15.—A writ of habeas corpus may be obtained upon motion to any of the superior courts of law or equity, or to a judge when those courts are not sitting. Probable cause must be shown, by the person moving, that there is a wrongful detention, and if the court or judge thinks that there is reasonable ground for suspecting illegality the writ is granted.

It is directed to the individual detaining the person in custody, and commands him to produce the body of the prisoner in court on a certain day, and there account for his detention, and to do and submit to whatsoever the court or judge shall order in the matter. If on the day mentioned the detainer can

justify the detention, the prisoner is remitted to his custody. If not he is discharged, and may then have his remedy by action.

The writ of habeas corpus existed at common law, but it has been more formally declared and defined by statutes, chief among which are 31 Car. 2, c. 2, and 56 Geo. 3, c. 100.

Limitation. RULE 16.—No action can be brought for false imprisonment except within four years next after the cause of action arose. But as imprisonment is a continuing tort, the period runs from the last day of the imprisonment, and not from the first.

Exceptions. (1) *Justices.*—An action against a justice of the peace for anything done by him in the execution of his office, must be commenced within six calendar months next after the commission of the act complained of (11 & 12 Vict. c. 44, s. 8).

(2) *Constables.*—Various Acts for the appointment and regulation of police, limit the period within which actions may be brought against them. The following are the most important: 10 Geo. 4, c. 44, relating to the Metropolitan police, by sect. 41 enacts that all actions for anything done in pursuance of the Act shall be (*inter alia*) commenced within six calendar months, and that a month's written notice shall be given to them, and the same provision is

extended to special constables and county policemen by 1 & 2 Will. 4, c. 41, and 2 & 3 Vict. c. 93, respectively. Borough constables are protected in a similar manner by 5 & 6 Will. 4, c. 76, s. 113; and sect. 76 of the same Act enacts that men sworn as such shall not only within the borough, but also within the county in which the same is situated, and in any county within seven miles of such borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable at the time of the passing of that Act had or thereafter might have within his constablewick.

Constables may also pay money into court. (See 11 & 12 Vict. c. 44, ss. 9, 11.)

All such actions against justices and constables must (by various Acts) be laid in the county in which the trespass was committed.

CHAPTER IV.

OF ASSAULT AND BATTERY.

Direct and Indirect Bodily Injuries. Torts affecting the body are either the immediate results of force put in motion by the defendant, or the indirect results of wrongful conduct on his part. In this chapter I shall speak of direct bodily injuries or trespasses.

Causing Death. Direct personal injuries causing death are crimes of a most heinous nature. They rather come, therefore, under the ordinances of the criminal than of the civil law. Putting these aside, all other direct bodily injuries may be considered as either assaults or more or less aggravated forms of battery.

Definition of Assault. RULE 17.—An assault is an unsuccessful attempt to do harm to the person of another.

(1) Thus, if one make an attempt, and have at the time of making such attempt a present ability, to do harm to the person of another, although he actually do no harm, it is nevertheless an assault; for example, menacing with a stick a person within reach thereof,

although no blow be struck (*Read v. Coker*, 13 C. B. 850).

(2) But a mere threat is no assault, unless there be a present ability to carry it out. This was illustrated by Pollock, C. B., in *Cobbet v. Grey* (4 Exch. 744). "If," said that learned judge, "you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (*a*), 'I will commit an assault,' I think that is not an assault."

(3) To constitute an assault there must be an *attempt*. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*Tuberville v. Savage*, 1 Mod. 3).

(4) For the same reason shaking a stick in sport at another is not actionable (see *Christopherson v. Bare*, 11 Q. B. 477).

Definition of Battery. RULE 18.—Battery consists in touching another's person hostilely or against his will, however slightly (*Rawlings v. Till*, 3 M. & W. 28).

This touching may be occasioned by a missile or any instrument set in motion by the defendant, as

(*a*) Query—battery.

by throwing water over the plaintiff (*Russell v. Horne*, 8 A. & E. 602), or spitting in his face, or causing another to be medically examined against his or her will (*Latter v. Braddell*, 29 W. R. 239). In accordance with the rule a battery must be involuntary; therefore a voluntarily suffered beating is not actionable (*Patteson, J.*, in *Christopherson v. Bare*, 11 Q. B. 477). Merely touching a person in order to engage his attention is, however, no battery (*Coward v. Baddeley*, 28 L. J., Ex. 261).

Wounding and Maiming. If the violence be so severe as to wound, the damages will be greater than those awarded for a mere battery; so, also, if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight), but otherwise the same rules of law apply to these injuries as to ordinary batteries.

When Actionable. RULE 19.—No person can in general lawfully commit an assault or battery.

Exceptions. (1) *Self-Defence.*—A battery is justifiable if committed in self-defence. Such a plea is called a plea of “son assault demesne.” But to support it, the battery so justified must have been committed in actual defence, and not afterwards and in mere retaliation (*Cockroft v. Smith*, 11 Mod. 43). Neither

does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*Cooper v. Beale*, *L. Raym.* 177).

(2) *Defence of Property*.—A battery committed in defence of real or personal property, is justifiable.

Thus, if one forcibly enters my house, I may forcibly eject him; but if he enters quietly, I must first request him to leave. If after that he still refuse, I may use sufficient force to remove him, in resisting which, he will be guilty of an assault (*Wheeler v. Whiting*, 9 *C. & P.* 265).

So, a riotous customer may be removed from a shop after a request to leave. For the same reason where the violence complained of consisted in the defendant attempting to take away certain rabbits from the plaintiff, which did not belong to him but to the defendant's master, and which the plaintiff had refused to give up, the defendant was held to have a good defence to an action of assault (*Blades v. Higgs*, 10 *C. B.*, *N. S.* 713. Affirmed, 11 *H. L. C.* 621).

(3) *Correction of Pupil*.—A father or master may moderately chastise his son, pupil, or apprentice (*Penn v. Ward*, 2 *Cr.*, *M. & R.* 338).

Other Exceptions.—An assault may be committed in order to stop a breach of the peace; to arrest a felon, or one who (a felony having actually been committed) is reasonably suspected of it; in arresting a person found committing a misdemeanor between the hours of 9 p.m. and 6 a.m.; and in arresting a malicious trespasser, or vagrant under the Vagrancy Act.

A churchwarden or beadle may eject a disturber of a congregation, and a master of a ship may assault and arrest an unruly passenger. So assaults and batteries, committed under legal process, are justifiable; but a constable ought not *unnecessarily* to handcuff an unconvicted prisoner, and if he do so he will be liable to an action (*Griffin v. Coleman*, 28 *L. J.*, *Ex.* 134) (*a*). And generally, where force is justifiable, no greater force can be lawfully used than the occasion requires.

Defence under 24 & 25 Vict. c. 100. By sections 42, 44, 45, it is enacted, in effect, that,—

Sub-rule.—*Where any person unlawfully assaults or beats another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine such offence, and if they deem the offence not to be proved, or find it to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they must forthwith make out a certificate stating the fact of such dismissal, and deliver the same to the party charged; and if any person shall have obtained such certificate, or having been convicted shall have suffered the punishment inflicted, he shall be released from all further or other proceedings, civil or criminal, for the same cause (see also sect. 43).*

(1) As to what constitutes a “hearing,” see *Vaughton v. Bradshaw*, 9 *C. B.*, *N. S.* 103. The

(*a*) The same rule as to notice, tender of amends and limitation applies to batteries committed by constables in the execution of their duty as in false imprisonment.

accused being ordered by the magistrate to enter into recognizances to keep the peace and to pay the recognizance fee, will not constitute a bar to an action (*Hartley v. Hindmarsh*, *L. R.*, 1 *C. P.* 553).

(2) The granting a certificate by a magistrate where the complaint is dismissed, is not merely discretionary. A magistrate is bound, on proper application, to give the certificate mentioned in the section (*Hancock v. Somes*, 28 *L. J.*, *M. C.* 196); and, if he refuses to do so, may be compelled by mandamus (*Coster v. Hetherington*, 28 *L. J.*, *M. C.* 198).

(3) The words "from all further or other proceedings against the defendant, civil or criminal, for the same cause," include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any other person consequentially aggrieved thereby (*Masper and wife v. Brown*, *L. R.*, 1 *C. P. Div.* 97; 25 *W. R.* 62).

(4) If a person is charged with an assault, and the complaint is dismissed and a certificate given him, he cannot avail himself of the defence under the statute, when sued on for the tort, unless he specially pleads such defence (*Harding v. King*, 6 *C. & P.* 427).

Damages. RULE 20.—In assessing what amount of damages may be recovered for an assault, or battery, or mayhem, the time when, and the place in which, the assault took place should be taken into consideration.

Thus, an assault committed in a public place calls

for much higher damages than one committed where there are few to witness it. “It is a greater insult,” remarks Bathurst, J., in *Tullidge v. Wade* (3 Wils. 19), “to be beaten upon the Royal Exchange than in a private room.”

Limitation. RULE 21.—No action can be brought for assault or battery except within four years next after the cause of action arose.

CHAPTER V.

OF BODILY INJURIES CAUSED BY NUISANCES.

Definition. RULE 22.—A nuisance consists in any wrongful conduct in the management of property, or any wrongful interference with the property of the public, not necessarily depending for its wrongful character upon negligence.

General Duty. RULE 23.—A person is bound so to use his property as not to injure other persons, and he is also bound to observe the express provisions of the law with regard to the user of his own and the public property.

(1) *Excavations.* Thus, where a man makes an excavation adjoining a highway, and keeps it unfenced, he will be liable for any injury occasioned to a person falling into it (*Barnes v. Ward*, 9 C. B. 392; *Bishop v. Trustees of Bedford Char.*, 28 L. J., Q. B. 215).

(2) *Escape of Water, Sewage, &c.* So a person will be liable for damage done to his neighbour by the escape of water which he has stored on his own

premises (*Hardman v. N. E. R. Co.*, 3 C. P. D. 168, and see *ante*, p. 16); or for injury occasioned by the escape of sewage, &c. (*Humphries v. Cousins*, L. R., 2 C. P. D. 239). See further *Alston v. Grant*, 3 Ell. & Bl. 128; *Merivale v. Trustees of Exeter Turnpike Road*, L. R., 3 Q. B. 149; *Norton v. Scholefield*, 9 M. & W. 665.

(3) *Noxious Fumes—Noisy Trades, &c.*) And to keep anything injurious to the health of persons living near, as a foul cesspool, or to carry on any noisome or noxious employment, is a nuisance. For cases on “Noxious Fumes” see *Tipping v. St. Helen’s Smelting Co.*, L. R., 1 Ch. App. 66; *Crump v. Lambert*, L. R., 3 Eq. 409; *Salvin v. N. Brancepath Coal Co.*, L. R., 9 Ch. 705; *Malton Board of Health v. Malton Manure Co.*, L. R., 4 Ex. D. 302.

(4) *Statutory Nuisances.* Certain acts have been declared nuisances by statute, and private damage caused by them is of course actionable. Thus by 24 & 25 Vict. c. 100, s. 31 (re-enacting 7 & 8 Geo. 4, c. 18), the setting of spring-guns, man-traps, or other engines calculated to kill or do grievous bodily harm to a trespasser is made a misdemeanor, and even a trespasser hurt thereby may recover; for although it would be partly owing to his own misconduct, yet if the defendant might, by acting rightly, have avoided doing the injury, the plaintiff’s contributory misconduct is no excuse. But this act does not apply to the setting of traps or guns in the night in dwelling-houses for the protection thereof.

So by the General Highway Act, 5 & 6 Will. 4, c. 50, s. 70, it is made illegal for any person to sink

any pit, or erect any steam or other like engine, gin, or machinery attached thereto, within twenty-five yards from any part of a carriage or cart way, unless concealed within some building, or behind some fence, so as to guard against danger to passengers, horses, or cattle. It also prohibits the erection of windmills within fifty yards, and fires for the burning ironstone, limestone, or making bricks or coke, within fifteen yards, of a carriage or cart way.

Sect. 72 prohibits the letting off of fireworks or firearms within fifty feet of the centre of the way, as also the laying of things upon it or obstructing it in any way.

By this Act (creating these, or some of these, duties), any corporal injury caused to an individual by their non-observance is actionable, even though the person injured were trespassing at the time (within twenty-five yards of the way). But if the Act has been complied with, any injury, caused by any of the things therein mentioned, would be no ground of action, there being no *injuria* or wrongful act.

Thus, where the defendants were owners of waste land bounded by two highways, and worked a quarry outside the prohibited distance in such land, and the plaintiff walking over the waste, fell into the quarry and broke his leg, it was held that no action lay, the plaintiff being a mere trespasser (*Hounsell v. Smith*, 29 *L. J.*, *C. P.* 203; and see *Binks v. S. Y. R. Co.*, 32 *L. J.*, *Q. B.* 26; *Hardcastle v. S. Y. R. Co.*, 23 *L. J.*, *Ex.* 139).

And so, by the civil law, a trespasser could not recover for injuries suffered whilst trespassing,

through the dangerous business of the landowner, for “*extra culpam esse intelligitur si seorsum a viâ forte vel in medio fundo cædebat, quia in loco nulli extraneo jus fuerat versandi*” (*Inst.*, lib. iv., iii. 5).

(5) *Ruinous Premises*. Leaving premises adjoining a highway, or the land of another, in a ruinous condition is a public nuisance entitling a person, injured thereby, to damages (*Todd v. Flight*, 30 *L. J.*, *C. P.* 21; see also *Gwinnell v. Eames*, *L. R.*, 10 *C. P.* 658; *Nelson v. Liverpool Brewery Co.*, *L. R.*, 2 *C. P. D.* 311; *Tarry v. Ashton*, 1 *Q. B. D.* 314).

Owner and Occupier. But here a question arises as to the respective liabilities of the landlord and the tenant.

RULE 24.—As between landlord and tenant, there is no implied obligation on the part of the former that the property is in a safe condition (*Keats v. Cadogan*, 20 *L. J.*, *C. P.* 21; *Hart v. Windsor*, 12 *M. & W.* 68; *Erskine v. Adeane*, 42 *L. J.*, *Ch.* 835; *L. R.*, 8 *Ch.* 756). With regard to third parties, the tenant is the person responsible for any injury resulting from the premises being out of repair, and the landlord will also be responsible if he has done any act authorizing the continuance of the dangerous state of the house (per Bovill, *C. J.*, *Pretty v. Birkmore*, *L. R.*, 8 *C. P.* 404; *Broder v. Scullard*, *L. R.*, 2 *Ch. D.* 692;

Humphries v. Cousins, L. R., 2 C. P. D. 239; 46 L. J., C. P. 438; *Firth v. Bowling Iron Works Co.*, L. R., 3 C. P. D. 254; 47 L. J., C. P. 358).

(1) Thus, if in consequence of the ruinous state of a house, the chimney fall and injure the tenant's family, yet he has no remedy, unless the landlord had contracted to keep the house in repair, or unless there was fraud on his part in concealing the defect from the tenant (*Gott v. Gandy*, 23 L. J., Q. B. 1; *Keats v. Cadogan*, 20 L. J., C. P. 76).

(2) The defendant let premises to a tenant under a lease, by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous. A passer by, in consequence, fell into the aperture, and was injured: Held, that the obligation to repair, being, by the lease, cast upon the tenant, the landlord was not liable for this accident. And Keating, J., said, "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorized the continuance of this coal shoot in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to show that he authorized the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair (see also *Gwinnell v.*

Eamer, L. R., 10 *C. P.* 658, and *Rich v. Basterfield*, 16 *L. J.*, *C. P.* 273; and comp. *Roswell v. Prior*, 12 *Mood.* 639).

(3) In *Nelson v. The Liverpool Brewery Co.* (25 *W. R.* 877), Lopes, J., laid it down, that the owner of premises demised to a tenant, is not liable for an injury sustained by a stranger, owing to the premises being out of repair, unless he has either contracted to do the repairs, or *has let the premises in a ruinous and improper condition.* It is, however, humbly suggested that the last alternative is not accurate, except where the tenant has not undertaken the repairs (see remarks of Brett, L. J., in *Gwinnell v. Eamer, sup.*); and the dictum is not a complete summary of the law, inasmuch as there may be possible cases where the landlord may *prevent* the tenant from repairing a nuisance, by threatening an action for waste.

(4) But in *Todd v. Flight* (30 *L. J.*, *C. P.* 21; 9 *C. B.*, *N. S.* 377), where the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, that he *kept and maintained them in that state, and that the tenant was under no obligation to repair*, and the case was tried on demurrer, and the allegation was therefore assumed to be true, it was held that the landlord was liable.

Nuisances on Roads and Ways. RULE 25.—When a person expressly or impliedly

permits others to come on to roads on his land, he is liable for any injury caused to them by a nuisance thereon or near to the same, but not if they stray from such paths and trespass on the adjoining ground.

(1) Thus, a person permitting the use of a pathway to his house, holds out an invitation to all having any reasonable ground for coming to the house, to use his footpath, and he is responsible for neglecting to fence dangerous places; and so, also, a shopkeeper, who leaves a trap-door open without any protection, is liable to a person lawfully coming there, who suffers injury by falling through such trap-door (*Tindal, C. J., Lancaster Canal Co. v. Parnaby*, 11 *A. & E.* 243; *Barnes v. Ward*, 9 *C. B.* 420; 19 *L. J., C. P.* 200; *Gautret v. Egerton*, *L. R.*, 2 *C. P.* 371; *Chapman v. Rothwell*, 27 *L. J., Q. B.* 315; *Lax v Mayor of Darlington*, 5 *Ex. D.* 28).

But where a person, straying from the ordinary approaches to a house, trespasses where there is no path, and falls into an unguarded pit, he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and misconduct, and accordingly the principle of contributory negligence applies (*Wilde, B., Bolch v. Smith*, 31 *L. J., Ex.* 203).

(2) Railway companies are responsible for the state of their works, and therefore are liable to any person injured by the faulty construction, or negligent keeping up, of their bridges, embankments, &c. (*Chester v. Holyhead R. Co.*, 2 *Ex.* 251; *Kearney v.*

L. B. & S. Coast R. Co., L. R., 6 Q. B. 759; Lay v. Mid. Rail. Co., 34 L. T. 30). But if the ruinous state has been caused by a *vis major* or act of God, (as where a railway gives way through an extraordinary flood,) the company is not liable, provided their line is constructed so firmly as to be capable of resisting the foreseen, though more than ordinary, attacks of the weather (*Withers v. North Kent R. Co., 27 L. J., Ex. 417; G. W. R. Co. of Canada v. Fawcett, 1 Moore, P. C. C., N. S. 120; Murray v. Met. R. Co., 27 L. T. 762*).

(3) *Canals*. So, too, canal companies are bound to take reasonable care to make their canal as safe as possible to those using it (*Lanc. Canal Co. v. Parnaby, 11 A. & E. 243*).

(4) *Public roads*. Similar principles apply to public roads; so that where a local authority permits a road to get into a dangerous state, they are liable if any person is thereby injured (*Kent v. Worthing Local Board, L. R., 10 Q. B. D. 118*).

Injuries to Guests. RULE 26.—Mere guests, licensees and volunteers are considered as temporary members of the host's family, and can therefore only recover for injuries caused to them by hidden dangers which they did not know of, but which the host knew or ought to have known of. But visitors on business which concerns the occu-

pier of premises, may maintain an action for any injury caused by the unsafe state of the premises (see *Tray v. Hedges*, *L. R.*, 9 *Q. B. D.* 80).

(1) Thus in *Southcote v. Stanley* (1 *H. & N.* 247), the plaintiff was a guest of the defendant's, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held, that the plaintiff being a guest, was for the time being one of the family and could not recover for an accident, the liability to suffer which, he shared in common with the rest of the family.

(2) *Persons coming on business.* But where, on the contrary, a workman came *on business* to the defendant's manufactory, and there fell down an unguarded shaft, the defendant was held to be liable; although it would have been otherwise had the plaintiff been one of his own servants, for it was not a hidden danger (*Indermaur v. Dames*, *L. R.*, 1 *C. P.* 274; 2 *ib.* 311; *White v. France*, *L. R.*, 2 *C. P. D.* 308).

(3) The plaintiff, a licensed waterman, having complained to the person in charge, that a barge of the defendants was being navigated unlawfully, was referred to the defendant's foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger: Held, that the defendants were liable (*White v. France*, *L. R.*, 2 *C. P. D.* 308).

(4) *Nuisances on Railway Stations.* So, in the case of railway companies, the company must take great care to ensure the safety of persons coming to their

station, and if through want of light or proper directions any such person is injured, he may maintain an action against the company. Thus, where the plaintiff, having a return ticket, arrived at the wrong side of the station, and there being no proper crossing and no directions, crossed the line in order to get to his train, and in doing so, on account of the ill-lighted condition of the station, fell over a switch and was injured, it was held that an action lay against the company (*Martin v. G. N. R. Co.*, 24 *L. J.*, *C. P.* 209; *Burgess v. G. W. R. Co.*, 32 *L. T.* 76; *Shepherd v. Mid. R. Co.*, 20 *W. R.* 705).

Limitation. RULE 26A.—Actions for injuries to the person must be brought within the period of six years next after the cause of action arose.

Exception. Where the injury has caused death, any action brought by the personal representative, under Lord Campbell's Act, must be commenced within twelve calendar months from the death (sect. 3).

CHAPTER VI.

OF INJURIES TO PERSON OR PROPERTY CAUSED BY
NEGLIGENCE.

Definition. RULE 27.—Negligence consists in the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do (*Blythe v. Birm. Water Co.*, 25 *L. J.*, *Ex.* 212).

RULE 28.—It is a public duty, incumbent upon every one, to exercise due care in his daily life; and any damage resulting from his negligence is a tort.

(1) Thus, where the plaintiff was in the occupation of certain farm buildings, and of corn standing in a field adjoining the field of the defendant, and the defendant stacked his hay on the latter, knowing that it was in a highly dangerous state and likely to catch fire, and it subsequently did ignite and set fire to the plaintiff's property, it was held, that the defendant was liable (*Vaughan v. Menlove*, 3 *Bing. N. C.* 468).

(2) So, where the defendant entrusted a loaded gun to an inexperienced servant girl, with directions to take the priming out, and she pointed and fired it at

the plaintiff's son, wounding and injuring him—the defendant was held liable (*Dixon v. Bell*, 5 M. & S. 198).

(3) On the other hand, a water company whose apparatus was constructed with reasonable care, and to withstand ordinary frosts, was held not to be liable for the bursting of the pipes by an extraordinarily severe frost (*Blythe v. B. W. W. Co.*, *sup.*).

(4) And so, where the defendant's line was misplaced by an extraordinary flood, and by such misplacement injury was done to the plaintiff, it was held that no action could be maintained against the defendants (*Withers v. The North Kent R. Co.*, 27 L. J., *Ex.* 417).

(5) Again, a valuable greyhound was delivered by his owner to the servants of a railway company, who were not common carriers of dogs, to be carried; and the fare was demanded and paid. At the time of delivery the greyhound had on a leathern collar, with a strap attached thereto. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of a station, and, while so fastened, it slipped its head, ran on the line, and was killed: Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence (*Richardson v. N. E. R. Co.*, L. R., 7 C. P. 78).

(6) *Dangerous animals.* So, if a man knowingly keeps dangerous animals, he is answerable for any injury they may commit, and that, too, though he

has done his best to secure their safe keeping. In other words, he who keeps an animal of the above description (*May v. Burdett*, 9 Q. B. 101), knowing it to be so, does it at his peril (*Cox v. Burbidge*, 13 Com. B., N. S. 430). If the animal is by nature dangerous, no actual knowledge of its previous disposition is necessary, but if the animal is naturally domestic, then actual knowledge (technically called "scienter") of his fierceness must be proved (*R. v. Huggins*, 2 *Ld. Raym.* 1583, and see also *Saunders on Negligence*, p. 99, where the whole subject is very ably discussed). It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal has actually bitten another person before it bit the plaintiff; it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition, by attempting to bite (*Worth v. Gilling*, *L. R.*, 2 C. P. 685). It has been held that, if the owner of a dog appoints a servant to keep it, the servant's knowledge of the animal's disposition is the knowledge of the master (*Baldwin v. Casella*, *L. R.*, 7 *Ex.* 325). But where the complaint is made to a servant, who has no control over the defendant's business, nor of his yard where his dog was kept, nor of the dog itself, the knowledge of the servant would not necessarily be that of the master (*Stiles v. The Cardiff Steam Navigation Co.*, 33 *L. J.*, Q. B. 310, and see *Applebee v. Percy*, *L. R.*, 9 C. P. 647).

Exception. By 28 & 29 Vict. c. 60, s. 1, scienter of a dog's disposition, who has injured sheep or cattle, need not be proved. It has been held that

horses are to be included under the term *cattle* (*Wright v. Pearson*, *L. R.*, 4 *Q. B.* 582). Nor is it necessary to show a scienter where the action is founded on the breach of a contract to use reasonable care, and not upon any breach of duty, as the owner of a mischievous animal (*Smith v. Cook*, *L. R.*, 1 *Q. B. D.* 79).

For further examples of negligence see *Holmes v. Mather*, *L. R.*, 10 *Ex.* 261; *Watling v. Oastler*, *L. R.*, 6 *Ex.* 73; *Richardson v. G. E. R. Co.*, *L. R.*, 10 *C. P.* 486; *Smith v. G. E. R. Co.*, *L. R.*, 2 *C. P.* 4; *Simson v. London General Omnibus Co.*, *L. R.*, 8 *C. P.* 390; *Crouchurst v. Amersham Burial Board*, *L. R.*, 4 *Ex. D.* 5; *Firth v. Bowling Iron Co.*, *L. R.*, 3 *C. P. D.* 254; *Harris v. Mobbs*, *L. R.*, 3 *Ex. D.* 268; *Clark v. Chambers*, *L. R.*, 3 *Q. B. D.* 327; *Parry v. Smith*, *L. R.*, 4 *C. P. D.* 325; *White v. France*, *L. R.*, 2 *C. P. D.* 308; *Manzoni v. Douglas*, *L. R.*, 6 *C. P. D.* 145. As to the manner of estimating damages in cases of injuries arising from railway accidents, see the recent case of *Phillips v. L. & S. W. R. Co.*, *L. R.*, 5 *C. P. D.* 280.

From the above rule and illustrations, it will be seen that the term negligence is quite a relative expression, and that in deciding whether a given act is, or is not, negligent, the circumstances attending each particular case must be fully considered. "A man," it has been said, "who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such person would be bound to keep a better look out than the man

who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands."

Contributory Negligence. **RULE 29.**—
Though negligence, whereby actual damage is caused, is actionable, yet if the plaintiff has himself contributed to his loss, he cannot recover from the defendant, except in the case mentioned in sub-rule 1.

(1) This rule is well illustrated by two cases, in each of which the *damnum* was the same. In *Fordham v. L. B. & S. C. R. Co.* (*L. R.*, 4 *C. P.* 719) the facts were these. The guard of one of the defendants' trains, forcibly closed the door of one of the carriages without giving any warning, whereby the hand of the plaintiff, who was entering the carriage, was crushed. It was held, that the jury were justified in finding that the guard was guilty of negligence, and that there was no contributory negligence on the part of the plaintiff.

(2) Where, however, the plaintiff, on entering a railway carriage, left his hand on the edge of the door half a minute after so entering, and the guard gave due warning before shutting the door, it was held that the act was attributable to the plaintiff's contributory negligence, in leaving his hand carelessly upon a door which he must have known would be immediately shut (*Richardson v. Metro-*

politan R. Co., L. R., 3 C. P. 326, and see Batchelor v. Fortescue, L. R., 11 Q. B. D. 474).

(3) And so, in cases of collision, the question is, whether the disaster was occasioned wholly by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that, but for his default in this respect, the disaster would not have happened. In the former case he recovers, in the latter not (*Tuff v. Warman, 27 L. J., C. P. 322*); and for further illustrations of the rule, see *Sketton v. L. & N. W. R. Co., L. R., 2 C. P. 631*; *Stubley v. L. & N. W. R. Co., L. R., 1 Ex. 13*; *Stapley v. L. B. & S. C. R. Co., L. R., 1 Ex. 21*; *Cliff v. Mid. R. Co., L. R., 5 Q. B. 258*; *Ellis v. G. W. R. Co., L. R., 9 C. P. 551*; *Armstrong v. Lanc. & York. R. Co., L. R., 10 Ex. 47*; and *Darey v. L. & S. W. R. Co., L. R., 11 Q. B. D. 213*.

Where Contributory Negligence no Excuse. Sub-rule 1.—*If the defendant might, by the use of ordinary care, have avoided the consequences of the plaintiff's mere negligence, the plaintiff is entitled to recover* (*Radley v. L. & N. W. R. Co., L. R., 1 App. Cas. 754*; see also *Dublin, Wicklow, and Wexford R. Co. v. Slattery, L. R., 3 App. Cas. 1155*; *Watkins v. G. W. R. Co., 46 L. J., C. P. 817*).

The law on this point is thus summarized by Willes, J.: "If both parties were equally to blame, and the accident the result of their joint negligence, the plaintiff could not be entitled to recover. If the

negligence and default of the plaintiff was in any degree the proximate cause of the damage, he could not recover, however great may have been the negligence of the defendant. But if the negligence of the plaintiff was only remotely connected with the accident, then the question is, whether the defendant might not, by the exercise of ordinary care, have avoided it" (*Tuff v. Warman*, 27 *L. J.*, *C. P.* 322).

✓(1) Therefore, where the plaintiff left his ass with its legs tied in a public road, and the defendant drove over it, and killed it, he was held to be liable; for he was bound to drive carefully, and circumspectly, and had he done so he might readily have avoided driving over the ass (*Davies v. Mann*, 10 *M. & W.* 549).

(2) So, where the plaintiff was a passenger on an omnibus which was racing with the defendant's omnibus, and in trying to avoid a cart a wheel of the defendant's omnibus came in contact with a step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the curbstone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck against a lamp-post and he was thrown off: Held, that the jury were properly directed that the defendant was liable (*Rigby v. Hewitt*, 5 *Ex.* 247).

(3) The plaintiff, a passenger on board a steamboat, was injured by the falling of an anchor, caused by the defendant's steamboat striking the other steamboat. It was no defence to say that the accident arose in part from the negligent stowage of the anchor, or that the plaintiff was in a part of the

vessel where he ought not to have been (*Greenland v. Chaplin*, 5 *Ex.* 243).

Contributory Negligence in Infants. Sub-rule 2.—*It was formerly thought that, where the plaintiff was a child of tender years, it was no defence to an action of negligence to prove that he himself had contributed to his injury (Lynch v. Nurdin, 1 Q. B. 29). But it seems to be now clearly settled, that the principle of contributory negligence applies to all cases, whether the plaintiff can be considered of an age to know the nature of the act he is doing, or otherwise (Singleton v. Eastern Counties R. Co., 7 C. B., N. S. 287; Abbot v. McFie, Hughes v. McFie, 2 H. & C. 744; 33 L. J., Ex. 177).*

Thus, where the defendant exposed in a public place for sale, unfenced or without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion; and the plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his finger within the machine, whilst another boy was turning the handle which moved it, and his fingers were crushed: Held, that the plaintiff could not maintain any action for the injury (*Mangan v. Atterton, L. R., 1 Ex.* 239).

But it appears that what would amount to contributory negligence in a grown-up person, may not be so in a child of tender years (per Kelly, C. B., *Lay v. M. R. Co., 34 L. T.* 30).

Lord Campbell's Act. Previously to this Act, no action could be maintained by the representatives of a person who had been killed by the negligence of another. The maxim *Actio personalis moritur cum personâ*, strictly applied, and the right of action was held to die with the person. By sect. 1 of this Act, the law is now altered, and it is thereby enacted—

RULE 30.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony (9 & 10 Vict. c. 92, s. 1).

Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think

proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct (sect. 2).

Not more than one action shall lie for the same cause of complaint, and every such action shall be commenced within twelve calendar months after the death of such deceased person (sect. 4).

Where there is no executor or administrator, as above stated, or if there is such executor or administrator, but no action is brought within six months by him, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative would have sued (27 & 28 Vict. c. 95, s. 1, and see *Holleran v. Bagnell*, 4 L. R. Ir. 740).

In respect to actions brought under the provisions of this statute, the following points must be remembered—

(1) The personal representatives (or should they not sue, the parties mentioned in the last clause of

the rule) can only maintain the action in those cases in which, had the deceased lived, he himself could have done. So, if the deceased had been guilty of such contributory negligence as would have barred him from succeeding, those claiming as his representatives can stand in no better position (*Pym v. G. N. R. Co.*, 4 B. & S. 396).

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased.

The word *parent* shall include a grand-parent and a step-parent. The word *child*, a grand-child and a step-child, and a child *en ventre sa mère* (*The George and Richard*, L. R., 3 Adm. 466 ; 24 L. T. 717), but not a bastard (*Dickinson v. N. E. R. Co.*, 2 Hurl. & Coll. 735).

The jury may proportion the damages amongst these persons in such shares as they may think proper.

(3) The persons for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased (*Franklin v. S. E. R. Co.*, 3 Hurl. & N. 211).

By the expression "*pecuniary loss*" is meant "some substantial detriment in a worldly point of view." So, loss of reasonably anticipated pecuniary benefits, loss of education or support is sufficient (*Pym v. G. N. R. Co.*, *sup.*; *Franklin v. S. E. R. Co.*, *sup.*). For instance, where the plaintiff was old and infirm and had been partly supported by his son, the deceased (*Hetherington v. N. E. R. Co.*, L. R., 9 Q. B. D. 160). Loss of mere gratuitous liberality (*Dalton v. S. E. R. Co.*, 27 L. J., C. P. 227), or to his personal property by

expenses incurred in medical treatment is equally so (*Bradshaw v. Lanc. & York. R. Co.*, *L. R.*, 10 *C. P.* 89; but see *Leggot v. G. N. R. Co.*, 1 *Q. B. D.* 599). Funeral expenses *aliter* (per Bramwell, *Osborn v. Gillet*, *L. R.*, 8 *Ex.* 88); nor can a person recover compensation where the pecuniary advantage he has lost arose from a contract between himself and the deceased, and not from his relationship to him (*Sykes v. N. E. R. Co.*, 44 *L. J.*, *C. P.* 191).

(4) If the deceased had obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*Read v. G. E. R. Co.*, *L. R.*, 8 *Q. B.* 555).

(5) The death must be actually caused by the wrongful act for which compensation is sought.

(6) The action must be brought within twelve calendar months after the death of the deceased.

Proof of Negligence. RULE 31.—As a general rule the onus of proving negligence is thrown upon the plaintiff (*Hammack v. White*, 11 *C. B.*, *N. S.* 588; *Toomey v. L. & B. R. Co.*, 3 *C. B.*, *N. S.* 146).

Exception. Where, however, a thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things, and using proper care, it affords,

CHAPTER VII.

OF ADULTERY.

Definition. RULE 33.—Adultery is the having criminal intercourse with the wife or husband of another.

As between man and wife, the law, under certain conditions, gives a remedy by divorce, but of this it is not my intention here to treat. It also gives to an injured husband a further remedy.

Damages. RULE 34.—A husband may in a petition to the Divorce Division of the High Court claim damages from any person on the ground of his having committed adultery with his (the petitioner's) wife (20 & 21 Vict. c. 85, s. 33).

Before the passing of the above Act, the remedy which a husband had against the seducer of his wife was an action of criminal conversation, or "*crim. con.*" as it was usually called. That action is, however, now abolished, and the remedy indicated in the preceding rule substituted in its stead.

By sect. 33 of the same Act, the court is empowered to direct in what way the damages obtained shall be applied.

The usual course is, first, to allow the petitioner his costs, and, then, to settle the residue on the wife (while she remains chaste) and children, the wife taking the interest during her life, and the children taking the principal after her death (*Mayne on Damages*, 386; *Latham v. Latham and Gethin*, 30 *L. J., P. M. & A.* 43; *Clarke v. Clarke*, 31 *L. J., P. M. & A.* 61).

The court has, however, entire discretion over the application of the damages; and, accordingly, where it was proved, on the hearing of the petition, that there had been no issue of the marriage, and that the respondent was living with the co-respondent, the court made the order for the payment of damages assessed against the co-respondent part of the decree *nisi*, instead of postponing it until the decree absolute (*Evans v. Evans*, *L. R.*, 1 *P. & D.* 36. See also *Taylor v. Taylor and Wallis* (39 *L. J., Mat.* 23), where the court refused to settle any portion of the damages on the wife; and *Meyern v. Meyern and Myers*, *L. R.*, 2 *P. D.* 254).

Mitigation of Damages. It is obvious that it is impossible to assess the damages in the case of adultery according to any scale calculated on the ground of giving compensation. It is in fact a wrong for which no adequate compensation can be given. The damages are therefore more properly regarded as in their nature penal, and accordingly vary very much with the more or less heinous circumstances of each case.

Sub-rule.—*The amount of the damages depends upon the husband's circumstances and conduct, the terms upon which he and his wife lived together, and the wife's general character (Ad. 899).*

(1) Thus, evidence of the wife's adultery with other men, before the adultery with the co-respondent, is admissible in reduction of damages, as showing that the petitioner has lost but a worthless wife (*Winter v. Henn*, 4 C. & P. 498; *Foster v. Foster*, 33 L. J., P. & M. 150, n.).

(2) And so is evidence that the marriage was kept secret, and that the defendant did not know of it (*Calcraft v. Earl of Harborough*, 4 C. & P. 501).

(3) So, also, are letters from the respondent to the co-respondent enticing him to commit the adultery (*Elsam v. Fawcett*, 2 Esp. 562).

(4) So, also, where the husband and wife are living apart in different families, for their mutual convenience (as opposed to a total separation), the damages may be thereby reduced (*Edwards v. Crock*, 4 Esp. 39).

Exceptions. A petitioner will not be entitled to recover if he has been a party to his own dishonour, either by giving his wife a general licence to conduct herself as she pleased with men generally, or by consenting to the particular adultery with the co-respondent, or by having permanently and totally given up all advantage to be gained from her society (*Alderson, B., Winter v. Henn*, 4 C. & P. 498), or by condoning the adultery (*Morris v. Morris*, 30 L. J., M. 111).

Thus, encouraging a wife to live as a prostitute, is a bar to damages for adultery with her (*Cibber v. Sloper*, cited 4 *T. R.* 655).

Such is a brief exposition of the law relating to a husband's remedies against the seducer of his wife. With regard to matrimonial wrongs as between husband and wife, they do not come within the scope of this work, being in my opinion certainly not torts, more probably wrongs *ex contractu*, but still more probably wrongs *sui generis* and *unique*.

CHAPTER VIII.

OF INJURIES TO RIGHTS OF SERVICE.

Definition. RULE 35.—An injury to service consists in (either directly or indirectly) wrongfully depriving another of the services of his child or servant (see *Berringer v. G. E. R. Co., L. R., 4 C. P. D.* 163).

This tort usually occurs through the debauching of a child or servant; but it is by no means confined to that, for it equally applies where one entices a servant away from his master, or wilfully or negligently inflicts corporeal injury on the servant or child so as to incapacitate them from performing their duties. The gist of the wrong is the interference with the plaintiff's right to the services in question, although, as will be seen hereafter, this is somewhat of the nature of a legal fiction nowadays.

Direct Injuries to Servants and Children.
RULE 36.—Every person is liable to an action who wrongfully injures another's child or servant, so as to incapacitate them from performing their usual duties (see *Berringer v. G. E. R. Co., sup.*); unless such injury

causes the immediate death of the servant or child, in which case no action is maintainable (*Osborn v. Gillet, L. R., 8 Ex. 88*).

Seduction. RULE 37.—Every person designedly (1) procuring a servant to depart from the master's service during the stipulated period of service, or a child to depart from that service while it exists, or (2) harbouring a servant, after wrongfully quitting the master, or (3) debauching such servant or child so as to incapacitate them from rendering such service, is liable to an action (*Lumley v. Gye, 2 Ell. & Bl. 224; Blake v. Lanyon, 2 T. R. 221*).

Thus, if I employed (against the will of his master) an apprentice or servant before the expiration of his term of service, I should be liable, for by so doing I should be affording him the means of keeping out of his master's service.

Contract of Service when implied. Sub-rule 1.—*In order to support an action for seduction, it is sufficient if a contract of service can be implied from the relation between the plaintiff and the alleged servant; and where a daughter is seduced very slight services will suffice to give a right of action.*

(1) Thus, in *Evans v. Walton (L. R., 2 C. P. 615)*, the daughter of the plaintiff (a publican), who lived with him and acted as his barmaid, but without any

express contract or wages, was induced by the defendant to leave her father's house: it was held, that the relation of master and servant might be implied from these circumstances, and that it matters not whether the service is at will or for a fixed period.

(2) So such small services as milking, or even making tea, have been held sufficient (*Bennett v. Allcott*, 2 T. R. 166; *Carr v. Clark*, 2 Chit. R. 261).

(3) Where the daughter lived at, and assisted in the duties of, the house from six in the evening until seven in the morning, and the rest of the day was employed elsewhere: it was held sufficient evidence of service (*Rist v. Taux*, 32 L. J., Q. B. 387); and where the daughter is a *minor*, living with her father, service will be presumed (*Harris v. Butler*, 2 M. & W. 542).

(4) But where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*Dean v. Peel*, 5 East, 45); not even when she partly supports her father (*Manley v. Field*, 29 L. J., C. P. 79).

(5) The plaintiff's daughter, being under age, left his house and went into service. After nearly a month, the master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her: it was held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore, sufficient evidence of service to maintain an action for the seduction (*Terry v. Hutchinson*, L. R., 3 Q. B. 599).

(6) When the child is only absent from her father's house on a temporary visit, there is no termination of her services, providing she still continues, in point of fact, one of his own household (*Griffiths v. Teetjen*, 15 C. B. 344).

Relation of Master and Servant at time of Seduction. Sub-rule 2.—*The relation of master and servant must exist at the time of the seduction (Davies v. Williams, 10 Q. B. 725); and it would appear also that the confinement, or illness, of the girl, must have happened while she was in the plaintiff's service.*

(1) Thus, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three-days' visit, with her employer's permission, to the plaintiff her mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother: Held, that there was no evidence of service at the time of the seduction. And also, by Kelly, C. B., and Martin and Bramwell, BB., that the action must also fail on the ground that the confinement did not take place whilst the daughter was in the plaintiff's service (*Hedges v. Tagg*, L. R., 7 Ex. 283).

(2) In *Long v. Keightley*, however (11 Ir. Rep. C. L. 221, C. P.), there was held to be a sufficient loss of service under the following circumstances. The plaintiff's daughter, aged twenty-four years, was seduced in the house and service of the plaintiff. The

day after she left Ireland for America, pursuant to a prior arrangement. Finding herself pregnant while in service there, she returned to her native country, and went to stay at her sister's house, where she was confined. Afterwards she returned to the house of her mother (the plaintiff). On the authority of *Hedges v. Tagg*, it was argued, that inasmuch as the confinement did not take place while the daughter was in the service of her mother, the action must fail. But the court distinguished the two cases on the ground, that in *Hedges v. Tagg's* case the girl's confinement happened when she was in the service of *another*; while in the case in discussion she was *constructively* in the service of the plaintiff directly she returned to Ireland.

Misconduct of Parents. Sub-rule 3.—*If a parent has introduced his daughter to, or has encouraged, profligate or improper persons, or has otherwise courted his own injury, he has no ground of action if she be seduced.*

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which, he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter: it was held, that the plaintiff had brought about his own injury, and had no ground of action (*Reddie v. Scoolt*, 1 Peake, 316).

Damages. Although the gist of the action is loss of service, yet the law somewhat inconsistently ordains that—

RULE 38.—In addition to the actual damage sustained, and any expenses which he has been put to by a servant's or daughter's illness, damages may be given for the loss which the plaintiff has sustained of the society and comfort of a child who has been seduced, and for the dishonour he has received and the anxiety and distress which he has suffered (*Bedford v. McKnown*, 3 *Esp.* 120; *Terry v. Hutchinson*, *L. R.*, 3 *Q. B.* 599).

Aggravated Damages. Sub-rule 1.—*Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated on that account.*

Thus, if he makes advances under the guiso of matrimony, and being civilly received by the plaintiff, repays his kindness with this worst of insults, the damages will probably be exemplary (see *Judgt. Tullidge v. Wade*, 3 *Wils.* 18).

Exception. But a promise to marry is no aggravation, the breach of it being a distinct ground of action, having an appropriate remedy.

Mitigated Damages. Sub-rule 2.—*The defendant may show the loose character of the daughter in mitigation of damages.*

Thus, the defendant may call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*Eager v. Grimwood*, 16 *L. J.*, *Ex.* 236; *Verry v. Watkins*, 7 *C. & P.* 308).

The damages for seduction are generally very large and exemplary, and the court will seldom interfere with them on the ground of being excessive.

Sub-rule 3. *If the defendant has induced a servant to leave his master's service, the latter may recover any gain which the defendant has derived from the servant's labours* (*Foster v. Stewart*, 3 *M. & S.* 201).

Limitation. RULE 39.—An action for seduction must be commenced within six years (see 21 *Jac.* 1, c. 16, s. 3).

CHAPTER IX.

OF TRESPASS TO LAND AND DISPOSSESSION.

SECTION I.

Of Trespass quare clausum fregit.

Definition. RULE 40.—Trespass *clausum fregit*, is a trespass committed in respect of another man's land, by entry on the same without lawful authority.

What constitutes. RULE 41.—An action lies for trespass *quare clausum fregit* without proof of actual damage.

(1) Thus, driving nails into another's wall, or placing objects against it, are trespasses (*Lawrence v. Obee*, 1 Stark. 22; *Gregory v. Piper*, 9 B. & C. 591).

(2) So, it is a trespass to allow one's cattle to stray on to another's land, unless there is contributory misconduct on his part, such as keeping in disrepair a hedge which he is bound by prescription or otherwise to repair (*Lee v. Riley*, 34 L. J., C. P. 212); but, if no such duty to repair exists, the owner of cattle is liable for their trespasses even upon uninclosed land (*Boyle v. Tamlin*, 6 B. & C. 337), and for all naturally resulting damage.

(3) Where one has authority to use another's land for a particular purpose any user going beyond the authorized purpose is a trespass. Thus, where the lord of a manor entitled by custom to convey minerals *gotten within the manor* along subterranean passages under the plaintiff's land, brought thereunder minerals from mines gotten outside the manor, it was held to be a trespass (*Eardley v. Lord Granville*, 24 W. R. 528).

Exceptions. (1) *Retaking Goods*.—If one takes another's goods on to his land, the latter may enter and retake them (*Patrick v. Colerick*, 3 M. & W. 485).

(2) *Cattle*.—If cattle escape on to another's land through the non-repair of a hedge which the latter is bound to repair, the owner of the cattle may enter and drive them out (see *Faldo v. Ridge*, Yelv. 74).

(3) *Distraining for Rent*.—So a landlord may enter his tenant's house to distrain for rent, or an officer to serve a legal process (*Keane v. Reynolds*, 2 E. & B. 748); but he may not break open the outer door of a house.

(4) *Reversioner inspecting Premises*.—A reversioner of lands may enter, in order to see that no waste is being committed.

(5) *Escaping Danger*.—A trespass is justifiable if committed in order to escape some pressing danger, or in defence of goods.

(6) *Grantee of Easement*.—And the grantee of an easement may enter upon the servient tenement, in order to do necessary repairs (*Taylor v. Whitehead*, 2 Doug. 745).

(7) *Public Rights*.—Land may be entered under the authority of a statute (*Beaver v. Mayor, &c. of Manchester*, 26 *L. J.*, *Q. B.* 311), or in exercise of a public right, as the right to enter an inn, provided there is accommodation (*Dansey v. Richardson*, 3 *E. & B.* 1859).

(8) *Liberum Tenementum*.—Lastly, land may be entered on the ground that it is the defendant's. This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands.

Trespassers ab Initio. RULE 42.—(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority, by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*. (2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*. (3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance, and not a mere nonfeasance (*Six Carpenters' case*, 1 *Sm. L. C.* 132).

Thus, in the above case, six carpenters entered an
v.

inn and were served with wine, for which they paid. Being afterwards at their request supplied with more wine, they refused to pay for it, and upon this it was sought to render them trespassers *ab initio*, but without success; for although they had authority by law to enter (it being a public inn), yet the mere non-payment, being a non-feasance and not a mis-feasance, was not sufficient to render them trespassers.

Possession necessary to maintain Trespass. In order to maintain an action of trespass the plaintiff must be in the possession of the land, for it is an injury to possession rather than to title. But now that different forms of action are abolished, this distinction is of small importance.

RULE 43.—The possession of land suffices to maintain an action of trespass against any person wrongfully entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*Jones v. Chapman*, 2 *Ex.* 821).

Thus a person entitled to the possession of lands

or houses, cannot bring an action of trespass against a trespasser until he is in actual possession of them (*Ryan v. Clark*, 14 Q. B. 65); but when he has once entered, he acquires the actual possession, and such possession then dates back to the time of the legal commencement of his right of entry, and he may therefore maintain actions against intermediate and then present trespassers (*Anderson v. Radcliff*, 29 L. J., Q. B. 128; *Butcher v. Butcher*, 7 B. & C. 402).

Onus of Proof of Title. Sub-rule 1.—*The onus lies upon a primâ facie trespasser, to show that he is entitled to enter upon land in another's possession* (*Brown v. Dawson*, 12 A. & E. 624; *Asher v. Whitlock*, L. R., 1 Q. B. 1).

Surface and Subsoil in different Owners. Sub-rule 2. *Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface* (*Cox v. Mousley*, 5 C. B. 549), *but he may for a trespass to the subsoil, as by digging holes, &c.* (*Cox v. Glue*, 17 L. J., C. P. 162). *So the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals* (*Reyse v. Powell*, 22 L. J., Q. B. 305), *unless the surface is disturbed thereby.*

Highways, &c. Sub-rule 3.—*When one dedicates a highway to the public, or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege*

granted (*Goodtitle v. Alder*, 1 *Burr.* 133; *Northampton v. Ward*, 1 *Wils.* 114).

An action for trespasses committed upon it, as, for instance, by throwing stones on to it or erecting a bridge over it, may be therefore maintained by the grantor (*Every v. Smith*, 26 *L. J.*, *Ex.* 345).

Joint Owners. RULE 44.—Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other (see *Jacobs v. Senard*, *L. R.*, 5 *H. L.* 464).

(1) Among such acts may be mentioned the destruction of buildings (*Cresswell v. Hedges*, 31 *L. J.*, *Ex.* 49), carrying off of soil (*Wilkinson v. Hagarth*, 12 *Q. B.* 837), and expelling the plaintiff from his occupation (*Murray v. Hall*, 7 *C. B.* 441).

(2) But a tenant in common of a coal mine may get the coal, or license another to get it, not appropriating to himself more than his share of the proceeds; for a coal mine is useless unless worked (*Job v. Potton*, *L. R.*, 20 *Eq.* 84).

Party-walls. There is also one other important case of trespass between joint-owners, viz., that arising out of a party-wall.

Sub-rule.—*If one owner of the wall excludes the other*

owner entirely from his occupation of it (as, for instance, by destroying it, or building upon it), he thereby commits a trespass; but if he pulls it down for the purpose of rebuilding it, he does not (Stedman v. Smith, 26 L. J., Q. B., 314; Cubitt v. Porter, 8 B. & C. 257).

Continuing Trespasses. RULE 45.—Where a trespass is permanent and continuing, the plaintiff may bring his action as for a continuing trespass, and claim damages for the continuation; and where after one action the trespass is still continued, other actions may be brought until the trespass ceases (*Bowyer v. Cook*, 4 C. B. 236).

Distress Damage feasant. It is convenient to mention here, a peculiar remedy of landowners for trespasses committed by cattle, viz. by seizing the animals whilst trespassing, and detaining them until reasonable compensation is made (see *Green v. Duckett*, L. R., 11 Q. B. D. 275). This is not, however, available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case of animals *feræ naturæ* reared by a particular person. In such cases the law, not recognizing any property in them, does not make their owner liable for their trespasses, but any person injured may shoot or

capture them while trespassing. Thus, I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*Hannam v. Mockett*, 2 B. & C. 939, per Bayley, J.).

Limitation. RULE 46.—All actions for trespass must be commenced within six years next after the cause of action arose (21 Jac. 1, c. 16, s. 3).

SECTION 2.

Of Dispossession.

Definition. RULE 47.—Dispossession or ouster consists of the wrongful withholding of the possession of land from the rightful owner.

Specific Remedy. Before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment for the actual recovery of the land, and since that statute it is by an action claiming the recovery of the land.

Onus of Proof. It is obvious that no reasonable system of law would throw upon the *primâ facie* owner of land the burden of proving his title upon every occasion that it was called in question; and therefore it is an elementary principle, that—

RULE 48.—The claimant must recover on

the strength of his own title, and not on the weakness of the defendant's (*Martin v. Strachan*, 5 T. R. 107).

Thus, mere possession is *prima facie* evidence of title, until the claimant makes out a better one (*Sweetland v. Webber*, 1 Ad. & E. 119).

Sub-rule 1.—*But where the claimant makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible.*

Thus, where one enclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*Asher v. Whitlock*, L. R., 1 Q. B. 1).

Jus Tertii. A man who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore—

Sub-rule 2.—*The defendant may set up the right of a third person to the lands, in order to disprove that of the claimant* (*Doe d. Carter v. Bernard*, 13 Q. B. 945).

But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*Asher v. Whitlock*, *sup.*).

Exceptions. (1) *Landlord and Tenant.*—Where the relation of landlord and tenant exists between the claimant and defendant, the landlord need not prove his title, but only the expiration of the tenancy, for a tenant cannot in general dispute his landlord's title

(*Delaney v. Fox*, 26 *L. J.*, *C. P.* 248), unless a defect in the title appears on the lease itself (*Saunders v. Merryweather*, 35 *L. J.*, *Ex.* 115; *Doe d. Knight v. Smyth*, 4 *M. & S.* 347). But nevertheless he may show that his landlord's title has *expired*, by assignment, conveyance, or otherwise (*Doe d. Marriott v. Edwards*, 5 *B. & Ad.* 1065; *Walton v. Waterhouse*, 1 *Wms. Saund.* 418).

The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus, where the claimant claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*Doe d. Oliver v. Powell*, 1 *A. & E.* 531; 3 *A. & E.* 188).

(2) *Servants and Licensees*.—The same principle is applicable to a licensee or servant who is estopped from disputing the title of the person who licensed him (*Doe d. Johnson v. Baytop*, 3 *A. & E.* 188; *Turner v. Doe*, 9 *M. & W.* 645).

Character of Claimant's Estate. RULE 49.
—The claimant's title may be either legal or equitable (*semble*), provided that he is equitably better entitled to the possession than the defendant.

Before the Judicature Act, 1873, it was a well-established rule that a plaintiff in ejectment must have the legal estate (*Doe d. North v. Webber*, 5 *Scott*,

189). It is submitted, however, that as all branches of the High Court now take cognizance of equitable rights, an equitable estate will be alone sufficient (see and consider principles of *Walsh v. Lonsdale*, *L. R.*, 21 *Ch. Div.* 9).

Limitation. RULE 50.—No person shall bring an action for the recovery of land or rent but within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (37 & 38 Vict. c. 57, s. 1; 3 & 4 Will. 4, c. 27, s. 2; *Brassington v. Llewellyn*, 27 *L. J.*, *Ex.* 297).

Exceptions. (1) *Disability*.—Where claimants are under disability, by reason of infancy, coverture, or unsound mind, they must bring their action within six years after such disability has ceased; provided that no action shall be brought after thirty years from the accrual of the right (37 & 38 Vict. c. 57, ss. 3, 4, 5, and 3 & 4 Will. 4, c. 27, ss. 16, 17).

(2) *Acknowledgment of Title*.—When any person in possession of lands or rents gives to the person, or the agent of the person entitled to such lands or rents, an acknowledgment in writing and signed, of the latter's title, then the right of such last-mentioned

person accrues at, and not before, the date at which such acknowledgment was made, and the statute begins to run as from that date (*Ley v. Peter*, 27 L. J., Ex. 239).

(3) *Ecclesiastical Corporations*.—The period in the case of ecclesiastical and eleemosynary corporations is sixty years (3 & 4 Will. 4, c. 27, s. 29).

Commencement of Period of Limitation.

Sub-rule 1.—*The right to maintain ejectment, accrues (a) in the case of an estate in possession, at the time of dispossession or discontinuance of possession of the profits or rent of lands, or of the death of the last rightful owner (3 & 4 Will. 4, c. 27, s. 3) ; and, (b) in respect of an estate in reversion or remainder, or other future estate or interest, at the determination of the particular estate. But a reversioner or remainderman must bring his action within twelve years from the time when the owner of the particular estate was dispossessed, or within six years from the time when he himself becomes entitled to the possession, whichever of these periods may be the longest (37 & 38 Vict. c. 57, s. 2).*

Discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (see *Smith v. Lloyd*, 23 L. J., Ex. 194; *Cannon v. Rimington*, 12 C. B. 1).

Continual Assertion of Claim. Sub-rule 2.
—*No defendant is deemed to have been in possessi land, merely from the fact of having entered upon it ;*

and, on the other hand, a continual assertion of claim preserves no right of action (3 & 4 Will. 4, c. 27, ss. 10 and 11).

Therefore, a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period.

CHAPTER X.

OF PRIVATE NUISANCES AFFECTING REALTY.

Definition. RULE 51.—A private nuisance is anything done to the hurt or annoyance of the lands, tenements or hereditaments, corporeal or incorporeal, of another, not amounting to trespass.

(1) Thus a man has an undoubted right to get minerals lying in and under his land, but, in doing so, he must not mine or excavate so near to the land of his neighbour, as to disturb and cause it to subside; for there is a natural servitude imposed upon every owner of land to afford lateral support to the adjacent land of his neighbour in its original state, and the withdrawal of such support is a nuisance (*Humphreys v. Brogden*, 12 Q. B. 739).

(2) So, where the defendants planted on their own land, and about four feet distant from their boundary railings, a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow of the plaintiff, and the horse of the latter ate of the yew tree and died in consequence, the defendants were held to be liable (*Crowhurst v. Amer-sham Local Board*, L. R., 4 Ex. Dir. 5).

SECTION 1.

Nuisances to Corporeal Hereditaments.

RULE 52.—Any act or omission of a person, whereby sensible injury is caused to the property of another, or whereby the ordinary physical comfort of human existence in such property is *materially* interfered with, is actionable.

(1) *Fumes*. Thus, in the case of *Tippings v. St. Helens' Smelting Co.* (*L. R.*, 1 *Ch.* 66), the fact that the fumes from the company's works killed the plaintiff's shrubs, was held sufficient to support the action; for the killing of the shrubs was an injury to the property.

(2) *Noisy Trade*. So, too, it was said, in *Crumphorne v. Lambert* (*L. R.*, 3 *Eq.* 409), that smoke unaccompanied with noise, or with noxious vapour, noise alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence.

(3) And so, again, in *Walter v. Selfe* (4 *D. G. & Sm.* 322), Vice-Chancellor Knight Bruce said: "Both on principle and authority, the important point next for decision may properly, I conceive, be put thus: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially in-

terfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?" (and see *Soltau v. De Held*, 2 Sim., N. S. 133; and *Inchbald v. Robinson*, L. R., 4 Ch. 388).

(4) *Noisy Entertainments*. So, too, the collection of a crowd of noisy and disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*Walker v. Brewster*, L. R., 5 Eq. 25; and see also *Inchbald v. Robinson*, L. R., 4 Ch. 388).

(5) So, the letting off of rockets, and the establishment of a powerful band of music playing twice a week for several hours within one hundred yards of a dwelling-house, are nuisances (*Ib.*)

(6) So, if a person allow substances which he has brought on his land to escape into his neighbour's, an action lies without proof of negligence in the keeping of them. Thus, as we have seen (*supra*, p. 16), one who brings or collects water upon his land, does so at his peril, for if it escape and injure his neighbour, he is liable, however careful he may have been (*Fletcher v. Rylands*, L. R., 3 H. L. 330; *Fletcher v. Smith*, L. R., 2 App. Ca. 781), unless the escape was caused by something quite beyond the possibility of his control, as the act of God or malice of a third party (*Nichols v. Marland*, L. R., 2 Ex. Div. 1; *Box*

v. Jubb, *L. R.*, 4 *Ex. Div.* 77); but where the water is naturally upon the land, the owner is only liable for negligence in keeping it. And so, also, where water is brought upon land, or into a house, by the defendant, but for the joint use of himself and the plaintiff, the latter cannot complain of any damage (not attributable to the defendant's negligence) which its escape may cause to him (*Anderson v. Oppenheimer*, *L. R.*, 5 *Q. B. D.* 602).

(7) *Other Examples.* Other examples of nuisance to corporeal hereditaments, are overhanging eaves from which the water flows on to another's property (*Battishill v. Reed*, 25 *L. J.*, *C. P.* 290); or overhanging trees, or pigstys, creating a stench, erected near to another's house. And it would seem that noisy dogs, preventing the plaintiff's family from sleeping, are nuisances, if the jury find that such discomfort is caused; although, where the jury find that no serious discomfort has arisen, the court will not interfere (*Street v. Guggrell*, *Selwyn's N. P.*, 13th ed. 1090). So, also, a small-pox hospital, so conducted as to spread infection to adjoining lands, is a nuisance (*Hill v. Metropolitan Asylums Board*, *L. R.*, 6 *App. Ca.* 193).

Reasonableness of Place. Sub-rule 1.—*Where an act is proved to interfere with the comfort of an individual, so as to come within the legal definition of a nuisance, it cannot be justified by the fact that it was done in a reasonable place* (*Bamford v. Turnley*, 31 *L. J.*, *Q. B.* 286; *Hill v. Metropolitan Asylums Board*, *sup.*; *Truman v. L. B. & S. C. Ry. Co.*, *L. R.*, 25 *Ch. D.* 423). *But what would be a nuisance in one locality*

may not be one in another (St. Helens' Smelting Co. v. Tippings, 11 H. L. C. 650).

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation in respect of the particular injury he has sustained from it.

(2) In *St. Helens' Smelting Co. v. Tippings (supra)*, Lord Westbury said: "In matters of this description, it appears to me that it is a very desirable thing, to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter,—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves,—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town,

and the public, at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury *to property*, then unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances, the immediate result of which is sensible injury to the value of the property.” And Lord Cranworth said (referring to a case which he had tried when a Baron of the Exchequer): “It was proved incontestably that smoke did come, and in some degree interfere with a certain person; but I said, ‘You must look at it, not with a view to the question whether abstractedly that quantity of smoke was a nuisance, *but whether it was a nuisance to a person living in the town of Shields.*’”

Coming to the Nuisance. Sub-rule 2.—*It is no answer to an action for nuisance, that the plaintiff knew that there was a nuisance, and yet went and lived near it (Hole v. Barlow, 27 L. J., C. P. 208).*

Or in the words of Mr. Justice Byles in the above

case, "It used to be thought that if a man knew that there was a nuisance and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That, however, is not law now." The justice of this is obvious from the consideration, that, if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwelling-house.

Sub-rule 3.—*The right to carry on a noisome trade in derogation of the rights of another may be gained by custom, grant, or prescription, but not the right to carry on a trade which creates a public nuisance (see Elliotson v. Feetham, 2 Bing. N. C. 134; and see Flight v. Thomas, 10 A. & E. 590).*

SECTION 2.

Nuisances to Incorporal Hereditaments.

Introductory. A servitude is a duty or service which one piece of land is bound to render, either to another piece of land, or to some person other than its owner. The property to which the right is attached is called the dominant tenement, that over which the right is exercised being denominated the servient tenement.

Servitudes are either natural or conventional. Natural servitudes are such as are necessary and

natural adjuncts to the properties to which they are attached (such as the right of support to land in its natural state), and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription or grant. The right to the enjoyment of a conventional servitude is called an *easement* or a *profit à prendre*, according as the right is merely a right of user or a right of acquisition.

As to what kind and what length of user will give a right to the various kinds of servitudes known to our law, and as to what servitudes are governed by the common law doctrines of prescription and what by the Prescription Act, all these are matters of real property law, for which I must refer the reader to works on that subject; but wherever I shall hereafter speak of a servitude imposed, or an easement or *profit à prendre* gained, by custom or prescription, I must be understood to mean *properly* imposed or gained, in accordance with the doctrines of the law in reference to such matters of title.

Disturbance of Right of Support. RULE 53.—Every person commits a tort, who so uses his own land as to deprive his neighbour of the subjacent or adjacent support necessary to retain such neighbour's land in its natural and unencumbered state (*Backhouse v.*

Bonomi, 9 H. L. C. 503; *Birm. Corp. v. Allen*, L. R., 6 Ch. D. 284). But, in order to maintain an action for disturbance of this right, some appreciable damage must be shewn (*Smith v. Thackerah*, L. R., 1 C. P. 564), or, where an injunction is claimed, some irreparable damage must be threatened (*Birm. Corp. v. Allen*, *supra*).

(1) In *Humphreys v. Brogden*, Lord Campbell (in delivering the judgment of the court) said: "The right to *lateral* support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freeholds, from the surface of the land and the mines belonging to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings *and in its natural state*, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support is left; but if the surface subsides and is injured by the removal of these strata, although the operation may not have been conducted negligently nor contrary to the

custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which he is entitled from the adjoining surface close, it cannot be securely enjoyed as property, and under certain circumstances (as where the mineral strata approach the surface and are of great thickness) it might be entirely destroyed. We likewise think, that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals."

(2) Between the land of the plaintiffs and that of the defendants, who were the owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity in the intermediate land was, that when the defendants worked their coal, subsidence was caused in the surface of the plaintiff's land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' workings. Held, that the plaintiffs had no right of action against the defendants. And Sir G. Jessel, M. R., said :—" It appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever

originally rested, who was under no liability whatever to support the plaintiffs' land, should have that liability thrown upon him, without any default of his own, without any misconduct or misfeasance on his part. I cannot believe that any such law exists or ever will exist."

Exception.—Companies governed by the Railway Clauses Consolidation Act, 1845, do not acquire any such right to subjacent support, by purchasing the surface; and the owners of the mines may, after having given notice to the company, so as to give them the opportunity of purchasing the mines, work them with impunity, in the ordinary way (*G. W. R. Co. v. Bennett*, *L. R.*, 2 *H. L.* 29). But neither will an action lie against the company for any damage suffered by the mine owner, although perhaps he may demand compensation under the act (see *Dunn v. Birm. Canal Co.*, *L. R.*, 8 *Q. B.* 42).

Subterranean Water. Sub-rule 1.—*An owner of land has no right at common law to the support of subterranean water (Popplewell v. Hodgkinson, L. R., 4 Ex. 248).*

Right may be waived. Sub-rule 2.—*The right of support may be destroyed or prevented from arising by covenant, grant or reservation, but the language of the instrument must be clear and unambiguous (Rowbotham v. Wilson, 8 H. L. C. 348; Aspden v. Seddon, L. R., 10 Ch. App. 394, and cases there cited).*

Support of Buildings. Sub-rule 3.—*A tort is*

not committed by one, who so deals with his own property, as to take away the support necessary to uphold his neighbour's buildings, unless a right to such support has been gained by grant, express or implied (Partridge v. Scott, 3 M. & W. 220; Brown v. Robins, 4 H. & N. 186; N. E. R. Co. v. Elliott, 29 L. J., Ch. 808; Angus v. Dalton, L. R., 4 Q. B. D. 162).

(1) Thus, in *Partridge v. Scott*, it was said that "rights of this sort, if they can be established at all, must, we think, have their origin in grant; if a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbours, unless he has some grant to that effect."

(2) So again, as between adjoining houses, there is no obligation towards a neighbour, cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*Chandler v. Robinson*, 4 Ex. 163).

(3) But where, on the other hand, houses are built by the same owner, adjoining one another, and depending upon one another for support, and are afterwards conveyed to different owners, there exists, by a presumed grant and reservation, a right of support to each house from the adjoining ones (*Richards v. Rose*, 9 Ex. 218).

(4) And so, where adjoining houses are built by separate owners, a right of support may be gained

by long user (*Hide v Thornborough*, 2 C. & K. 250 ; *Angus v. Dalton*, L. R., 6 App. Ca. 740).

[N.B.—The whole subject of the support of buildings was under the consideration of the House of Lords in the celebrated case of *Angus v. Dalton*, which was twice argued before their lordships. In the Queen's Bench Division it was held by two judges to one, that where it was admitted that no grant by deed had been made, no implication of a grant could arise. The Court of Appeal and the House of Lords reversed this, holding that the enjoyment during twenty years of the support, in point of fact, raised a presumption that the plaintiffs were entitled thereto as matter of right, and that the circumstance that no grant of the easement had been made was not material ; although it was open to the defendant to rebut the presumption by evidence, either that the owner of the servient tenement did not know the nature of the easement, or was incapable of making a grant. The student should study the judgments in this case carefully.]

Extra Weight of Buildings. Sub-rule 4.—*The owner of land may maintain an action for a disturbance of the natural right to support for the surface, notwithstanding buildings have been erected upon it, provided the weight of the buildings did not cause the injury* (*Brown v. Robins*, 4 H. & N. 186 ; *Stroyan v. Knowles*, 6 ib. 454).

Light and Air. RULE 54.—There is no right *ex jure naturæ*, to the free passage of light and air to a house or building (2 & 3 Will. 4, c. 71, s. 6); but such a right may be acquired, either by grant from the contiguous proprietors, or by prescription. Where such a right has been gained, no person will be allowed to interrupt such passage, unless he can show that, for whatever purpose the plaintiff might wish to employ the light, there would be no *material* interference with it by the alleged obstruction (*Yates v. Jack*, *L. R.*, 1 *Ch.* 295; and see per Best, C. J., in *Back v. Stacey*, 2 *C. & P.* 465, and *Dent v. Auction Mart Co.*, *L. R.*, 2 *Eq.* 245; *Robson v. Whittingham*, *L. R.*, 1 *Ch.* 442, and *Theed v. Debenham*, *L. R.*, 2 *Ch. D.* 165).

(1) Thus, in *Yates v. Jack* (*sup.*), where it was contended that the plaintiff was not entitled to relief, because, for the purpose of his *then present* trade, he was obliged to shade and subdue the light, and that therefore he suffered no actual damage, Lord Cranworth said: “This is not the question. It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight. I desire, however, not to be understood as saying that the plaintiffs would have no right to an

injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred, or recognized, by the statute 2 & 3 Will. 4, c. 71, is an absolute and indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used. Therefore, I should not think the defendant had established his defence, unless he had shown, that, for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it" (and see *Aynsley v. Glover*, *L. R.*, 18 *Eq.* 544, and 10 *Ch.* 283).

(2) And so, where ancient lights are obstructed, the fact that the owner of the building, to which the ancient lights belong, has himself contributed to the diminution of the light, will not in itself preclude him from obtaining an injunction or damages (*Tapling v. Jones*, 11 *H. L. C.* 290; *Arcedeckne v. Kelk*, 2 *Giff.* 683; *Straight v. Burn*, *L. R.*, 5 *Ch.* 163).

(3) Nor will an enlargement of an ancient light, (although it will not enlarge the right, *Cooper v. Hubbock*, 31 *L. J.*, *Ch.* 123), diminish or extinguish it. And, therefore, where the owner of a building having ancient lights, enlarges or adds to the number of windows, he does not preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights (*Aynsley v. Glover*, *sup.*).

(4) The dominant tenement must be a building; and, therefore, a person who grants a lease of a house and garden, is not precluded (under the doctrine of not derogating from his own grant) from building on open ground retained by him adjacent to the

house and garden, though, by so doing, the enjoyment of the garden, as pleasure ground, is interfered with, there being no obstruction of light and air to the house (*Potts v. Smith*, *L. R.*, 6 *Eq.* 311).

Exception. Right over Grantor's Land.—A man cannot derogate from his own grant.

(1) Therefore, if one grants a house to A., but keeps the land adjoining the house in his own hands, he cannot build upon that land so as to darken the windows of the house. And if he have sold the house to one and the land to another, the latter stands in the grantor's place as regards the house (see per Bayley, J., *Canham v. Fisk*, 2 *Cr. & J.* 128; *Swansborough v. Coventry*, 9 *Bing.* 309; *Davies v. Marshall*, *De G. & Sm.* 557; *Freuen v. Phillips*, 11 *C. B.*, *N. S.* 449).

(2) And so, where two separate purchasers buy two unfinished houses from the same vendor, and, at the time of the purchase, the windows are marked out, this is a sufficient indication of the rights of each, and implies a grant (*Compton v. Richards*, 1 *Pr.* 27; *Glave v. Harding*, 27 *L. J.*, *Ex.* 286).

(3) Similarly, where two lessees claim under the same lessor, it is said that they cannot, in general, encroach on one another's access to light and air (*Coutts v. Gorham*, 1 *M. & M.* 396; *Jacomb v. Knight*, 32 *L. J.*, *Ch.* 601); but it would seem that this statement of the law is too wide, as it is difficult to see what right the second lessee can have against the first, as no act of his can be a derogation from the second demise; and, indeed, it has been distinctly held, that where the grantor sells the land but retains

the house, there is no duty upon the grantee of the land to abstain from building upon it, and the grantor cannot prevent him; for to do so would be as much as in the preceding case, a derogation from his own grant (*White v. Bass*, 31 L. J., Ex. 283).

Estoppel in case of Disturbance in pursuance of Licence. Sub-rule.—*If the owner of the dominant tenement authorizes the owner of the servient tenement, either verbally or otherwise, to do an act of notoriety upon his land, which, when done, will affect or put an end to the enjoyment of the easement, and such act is done, the licensor cannot retract.*

Thus, where A. had a right to light and air across the area of B., and gave B. leave to put a skylight over the area, which B. did: it was held that A. could not retract his licence, although it was found that the skylight obstructed the light and air. For it would be very unreasonable, that after a party has been led to incur expense in consequence of having obtained a licence from another to do an act, that other should be permitted to recall his licence (*Winter v. Brockwell*, 8 East, 309; *Webb v. Paternoster, Palmer*, 71).

Disturbance of Watercourse. RULE 55.—The right to the use of the water of a natural surface stream, belongs, *jure naturæ* and of right, to the owners of the adjoining lands, every one of whom has an equal right to use the water which flows in the stream; and consequently, no proprietor can have the

right to use the water to the prejudice of any other proprietors (*Chasemore v. Richards*, 7 H. L. Ca. 349; *Wright v. Howard*, 1 S. & S. 203; *Dickenson v. Gr. Junc. Canal Co.*, 7 Ex. 299). There can, however, be no property in water which runs through natural undefined channels underground. (*Chasemore v. Richards*, *sup.*; *Ballard v. Tomlinson*, L. R., 26 Ch. D. 194).

(1) Every riparian owner may reasonably use the stream for drinking, watering his cattle or turning his mill, and other purposes, provided he does not thereby seriously diminish the stream (see *Embrey v. Owen*, 6 Ex. 353).

(2) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrongdoer, even though no actual damage has been sustained (*Wood v. Waud*, 3 Ex. 748; *Embrey v. Owen*, 6 Ex. 369; *Crossley v. Lightowler*, L. R., 2 Ch. 478).

(3) Where, however, neighbours each possessed a well, and one of them turned sewage into his well, in consequence whereof the well of the other became polluted, it was held by Pearson, J., that no action lay; on the ground that, it being settled law that a landowner is entitled so to deal with underground water on his own land, as to deprive his neighbour of it entirely, it follows that he is equally entitled to render such water unfit for use by polluting it (*Bal-*

lard v. Tomlinson, sup.). This case is, however, still under appeal, and it may perhaps be respectfully doubted whether it was correctly decided. For there seems to be a considerable difference between intercepting water in which no property exists, on the one hand, and sending a new, foreign and deleterious substance on to another's property, on the other hand. The immediate damnum (*viz.*, the pollution of the water) might possibly be no legal damnum; but surely allowing sewage to escape into another's property (for *cujus est solum, ejus est usque ad inferos*) is of itself both an *injuria* and a *damnum*.

Penning back Water. Sub-rule.—*If by means of impediments placed in or across a stream a riparian proprietor causes the stream to flood the lands of a proprietor higher up the stream, he will be liable for damages resulting therefrom; and equally if a higher proprietor collects water and pours it into the watercourse in a body, and so floods the lands of a proprietor lower down the stream, he will be liable for damage resulting therefrom* (*Chasemore v. Richards*, 7 H. L. C. 349; *Sharpe v. Hancock*, 8 Sc. N. R. 46).

Exception. Prescriptive Rights.—Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*Acton v. Blundell*, 12 M. & W. 353; *Carlyon v. Lavering*, 1 H. & N. 784; 26 L.

Artificial Watercourses. RULE 56.—An artificial watercourse may have been ori-

ginally made under such circumstances, and have been so used, as to give all the rights which a riparian proprietor would have had if it had been a natural stream (*Sutcliffe v. Booth*, 32 *L. J.*, *Q. B.* 136).

(1) Where a loop had been made in a stream, which loop passed through a field A., it was held that the grantee of A. became a riparian proprietor in respect of the loop (*Nuttall v. Bracewell*, *L. R.*, 2 *Ex.* 1).

(2) A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the River Irwell, and the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867, he conveyed the mill, with all water rights, to the plaintiff. In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of water, it was held that the plaintiff was entitled to maintain the action (*Holker v. Porrit*, *L. R.*, 8 *Ex.* 107; *L. R.*, 10 *Ex.* (*Ex. Ch.*) 59).

(3) But where the watercourse is merely put in for a temporary purpose, as for drainage of a farm, or the carrying off of water pumped from a mine, a

neighbouring landlord, benefited by the flow from the drain or stream, cannot sue the farmer or mine owner for draining off the water, even after fifty years' enjoyment (*Greatrex v. Hayward*, 8 *Ex.* 291).

Private Rights of Way. The only right of way which calls for remark in an elementary work of this kind, is that which is said to arise by necessity.

RULE 57.—Where one grants land to another, and there is no access to the land sold, except through other land of the grantor, or no access to the land retained, except through the land sold, the law implies, in the one case, a grant to the purchaser of a private right of way over the land retained, and in the other case, a reservation to the vendor of a private right of way over the land sold (*Gayford v. Moffat*, *L. R.*, 4 *Ch.* 133; *Pennington v. Galland*, 22 *L. J.*, *Ex.* 349), and any disturbance of such rights constitutes a tort. But when the necessity ceases the right ceases, but the right revives again when the necessity revives (*Holmes v. Goring*, 2 *Bing.* 76; *Pearson v. Spencer*, 1 *B. & S.* 584).

Therefore, when by a subsequent purchase a man

can approach his land without going over that of his neighbour, his right to do so ceases; but upon the re-sale of such subsequent purchase the right revives.

Disturbance of Common. RULE 58.—A person commits a tort :—

(1) Where, having no right of common, he puts beasts on the land; or, having such right, he puts uncommonable ones on to it;

(2) Where, being a commoner, he surcharges or puts more beasts on the common than he is entitled to put; and

(3) Where he encloses or obstructs the common.

(1) The lord may by *prescription* put a stranger's cattle into the common, and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common; but, unless such prescription exists, the cattle of a stranger, or the uncommonable cattle of a commoner, may be driven off, or distrained damage feasant, or their owner may be sued either by the lord or a commoner.

(2) Surcharging generally happens where the right of common is appendant, that is to say, where the common is limited to beasts that serve the plough or manure the land, and are levant and couchant on the estate; or where it is appurtenant,

that is to say, where there is a right of depasturing a limited number of beasts upon the common, which number is taken to be the number which the land, in respect of which the common is appurtenant, is capable of supporting through the winter if cultivated for that purpose (*Can v. Lambert*, *L. R.*, 1 *Ex.* 168). A common in gross can only arise from express grant to a particular person and his heirs, and, having no connection with his land, the number of commonable beasts, unless expressly limited by the grant, is indefinite.

Sub-rule 1.—*Common appendant and appurtenant being limitable by law, a commoner surcharging the common, commits a wrong for which the lord may distrain the beasts surcharged, or bring an action, and any commoner may also bring an action, whether the surcharger be the lord or another commoner (Steph. Comm., bk. v. c. viii.).*

Obstruction. The common being free and open to all having commonable rights over it, it follows that—

Sub-rule 2.—*When the owner of the land or some other person so encloses or otherwise obstructs a common that the commoner is precluded from enjoying the benefit to which he is by law entitled, the commoner may maintain an action (Steph. Comm., bk. v. c. viii.; and see City Commissioners of Sewers v. Glass, L. R., 19 Eq. 134).*

This may happen, either by enclosing the land, or ploughing it up, or driving off the cattle, or making a warren and so stocking it that the rabbits eat up all the herbage. The lord may, however, lawfully make

a warren if the rabbits be so kept under as not to occasion this injury (*Ibid.*; and *Bullen v. Langdon*, *C. Eliz.* 876).

Other Disturbances. There are certain other kinds of disturbance, for which I must refer to larger works. Such are disturbance of patronage, pews, franchise and tenure.

Remedy by Abatement. The law gives a peculiar remedy for nuisances by which a man may right himself. This remedy is called abatement, and consists in the removal of the nuisance.

RULE 59.—A nuisance may be abated by the party aggrieved thereby, so that he commits no riot in the doing of it, nor occasions, in the case of a private nuisance, any damage beyond what the removal of the inconvenience necessarily requires (*Steph. Comm.*, bk. v. c. i.); but a man cannot enter a neighbour's land to prevent an apprehended nuisance (*a*).

(1) Thus, if my neighbour build a wall and obstruct my ancient lights, I may, after notice and

(*a*) It is generally very imprudent to attempt to abate a nuisance. It is far better to apply for an injunction.

request to him to remove it, enter and pull it down (*R. v. Rossurell*, 2 *Salk.* 459); but this notice should always be given (*Davies v. Williams*, 16 *Q. B.* 556).

(2) But where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*Norris v. Baker*, 1 *Roll. Rep.* 393, *fol.* 15).

(3) Obstructions to watercourses may be abated by the party injured, whether by diminution or flooding (*Roberts v. Rose*, *L. R.*, 1 *Ex.* 82).

(4) A commoner may abate an encroachment on his common, such as a house (*Davies v. Williams*, *supra*), or fence obstructing his right (*Mason v. Caesar*, 2 *Mod.* 66); but he cannot abate a warren however great a nuisance, but must appeal to a court of justice (*Cooper v. Marshall*, 1 *Burr.* 226).

Remedy of Reversioners. RULE 60.—Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*Beddingfield v. Onslow*, 1 *Saund.* 322).

(1) Thus, opening a new door in a house may be an injury to the reversion, even though the house is none the worse for the alteration; for the mere alte-

ration of property may be an injury (*Young v. Spencer*, 10 *B. & C.* 145, 152).

(2) So if a trespass be accompanied with an obvious denial of title, as by a public notice, that would probably be actionable (see judgment, *Dobson v. Blackmore*, 9 *Q. B.* 991).

(3) So, the obstruction of an incorporeal right, as of way, air, light, water, &c., may be an injury to the reversion (*Kidgell v. Moore*, 9 *C. B.* 364; *Met. Ass. Co. v. Petch*, 27 *L. J., C. P.* 330; *Greenlade v. Halli-*

Sub-rule 1.—*The action will not lie for a trespass or nuisance of a mere transient and temporary character* (*Baxter v. Taylor*, 4 *B. & Ald.* 72).

Thus, a nuisance arising from noise or smoke will not support an action by the reversioner (*Mumford v. O. W. & W. R. Co.*, 26 *L. J., Ex.* 265; *Simpson v. Savage*, 26 *L. J., C. P.* 50).

Sub-rule 2.—*Some injury to the reversion must always be proved, for the law will not assume it from any acts of the defendant* (*Kidgell v. Moore*, *sup.*).

CHAPTER XI.

OF FRAUD AND DECEIT.

A VERY important class of wilful injuries are those arising out of fraud and deceit.

RULE 61.—An action for deceit will lie (1) When the defendant has, by a fraudulent misrepresentation, induced another to act, and, so acting, he has been injured or damaged (*Pasley v. Freeman*, 2 Sm. L. C. 71): and (2) where, owing to such fraudulent representation made by him to another, some third person has been induced to act, and, so acting, has been injured or damaged; provided that such false representation was made with the direct intent that such third person should act in the manner that occasioned the injury or loss (*Langridge v. Levy*, 2 M. & W. 519).

(1) So, where one fraudulently misrepresents the amount of his business, and the person to whom such representation is made, acting on the faith thereof, purchases it and is damaged, an action of

deceit will lie against the vendor (*Dobell v. Sterens*, 3 B. & C. 623).

(2) Similarly, where a gunmaker sold a gun to B., for the use of C., fraudulently warranting it to be sound, and the gun burst while C. was using it, and he was thereby injured: Held, that C. might maintain an action for false representation against the gunmaker (*Langridge v. Levy*, *sup.*).

Moral turpitude necessary. Sub-rule 1.—*An action for damages for deceit cannot be maintained, unless the plaintiff establishes that the defendant has made a statement false in fact and fraudulent in intent* (per A. L. Smith, J., *Jolliffe v. Baker*, L. R., 11 Q. B. D. 274). *A statement false in fact, with regard to the truth or falsity of which the defendant knows himself to be entirely ignorant, and which he makes for the purpose of receiving some advantage to himself or some loss to the plaintiff, is fraudulent in intent; for he thereby lies about his state of knowledge. But a statement false in fact, but bonâ fide believed to be true by the defendant, is not fraudulent in intent* (*Ib.* and S. C., judgment of Watkin Williams, J., and see per Bramwell, L. J., in *Weir v. Bell*, L. R., 3 Ex. D. 243).

It is now well settled, that in order to make a person liable for a fraudulent misrepresentation, he must have been guilty of some moral wrong (cases above cited, and see also *Collins v. Evans*, 5 Q. B. 820; *Taylor v. Ashton*, 11 M. & W. 401; *Charlton v. Hay*, 32 L. T. 96; *Kennedy v. Panama, &c. Mail Co.*, L. R., 2 Q. B. 580). But it is by no means essential to show that the defendant knew, as a fact,

what he stated was *false*. “I conceive,” remarks Maule, J., in *Evans v. Edmunds* (13 C. B. 786), “that if a man, *having no knowledge whatever on the subject*, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is, in law, guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts.” And again, in *Taylor v. Ashton* (11 M. & W. 401), Parke, B., remarks, “There may, undoubtedly, be a fraudulent representation, *if made dishonestly*, of that which the party does not know to be untrue, if *he does not know it to be true*.”

The *fraudulent purpose* is absolutely essential (*Thom v. Bigland*, 8 Ex. 725). If it were otherwise, as remarked in *Bailey v. Walford* (9 Q. B. 197, 208), “a man might sue his neighbour for any mode of communicating erroneous information; such, for example, as having a conspicuous clock too slow, since the plaintiff might thereby be prevented from attending to some duty, or acquiring some benefit.”

A Principal's Liability for the Fraud of his Agent. Sub-rule 2.—*Though, as above stated, it is now settled, that the defendant, in actions of deceit, must have been guilty of moral fraud, it has also been held, after much conflict of opinion, that the fraud of the agent, acting within the scope of his employment, is, in law, the fraud of the principal.*

(1) Thus, a plaintiff, having for some time, on a guarantee of the defendants, supplied J. D., a cus-

tomers of theirs, with oats, on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment of the oats supplied, should be paid on receipt of the government money in priority to any other payment "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff, thereupon, supplied the oats to the value of 1,227*l.* The government money, amounting to 2,676*l.*, was received by J. D. and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to detain the whole sum of 2,676*l.* in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation: Held, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so; secondly, that the defendants would be liable for such fraud in their agent (*Barwick v. English Joint-Stock Bank, L. R., 2 Ex. 259*).

(2) An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A.,

which, by omitting a material fact, misled A., and induced him to accept a bill in which the bank was interested, and A. was compelled to pay the bill: Held, that A. could recover from the bank the amount so paid. In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated, for the purposes of pleading, as that of the principal (*Mackay v. Commercial Bank of New Brunswick, L. R., 5 P. C. 394.* See, also, *Addis v. Western Bank of Scotland, L. R., 1 H. L. 145*, and the recent case of *Houldsworth v. City of Glasgow Bank and Liquidators, L. R., 5 App. Ca. 317*).

Liability of Agent for Fraud of Sub-Agent. Sub-rule 3.—*A principal agent is not responsible for the false representation of a sub-agent made on behalf of his principal.*

So the directors of a limited company are not personally responsible for the fraudulent representation of an agent of the company, unless such representation was made by their inducement or authority (*Bear v. Sterenson, 30 L. T. 177*).

Fraudulent Character must be in Writing. Sub-rule 4.—*No action lies against a person for making a false representation of the conduct, credit, ability, or dealings of another, with intent to procure credit, money, or goods for such person, unless such false representation is in writing, signed by the defendant (9 Geo. 4, c. 14, s. 6).*

Under this act, a false representation as to the credit of another person, in order to maintain an

action, must be signed by the person making it, and not by an agent (*Swift v. Jewsbury* (P. O.) and *Goddard*, L. R., 8 Q. B. 244; 9 Q. B. (Ex. Ch.) 301). For the same reason, one partner cannot bind his co-partners, even though he has express authority to sign (*Mason v. Williams*, 28 L. T., N. S. 232).

Fraudulent Concealment and Non-disclosure. RULE 62.—The general rule, both of law and equity, in respect of concealment is, that mere silence with regard to a material fact which there is no legal obligation to divulge (as there would be in the case of a contract of insurance), will not avoid a contract or give a right of action.

(1) Thus, in the case of sale, although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, (since that would amount to a positive fraud on the vendee) yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee (see *Story on Contracts*, p. 511, cited with approval in *Ward v. Hobbs*, L. R., 4 App. Ca., p. 26; see also *Fletcher v. Snell*, 42 L. J., Q. B. 55).

(2) Thus, the defendant sent for sale, to a public market, pigs which he knew to be infected with a contagious disease. They were exposed for sale subject to a condition that no warranty would be given and

no compensation would be made in respect of any fault. No verbal representation was made by, or on behalf of, the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs which became infected. Some of the pigs bought from the defendant, and also some of those with which they were put, died of the contagious disease: Held, that the defendant was not liable for the loss sustained by the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease (*Ward v. Hobbs, sup.*). "The mere fact," said Brett, L. J., when that case was before the Court of Appeal (*L. R.*, 3 *Q. B. D.* 162), "of offering a defective chattel for sale, where nothing is said about quality and condition, and nothing is done to conceal the defect, gives no cause of action, though the seller knows of the defect, and he knows that if the purchaser even suspected him of the knowledge he would not buy."

(2) So, also, in *Peck v. Gurney* (*L. R.*, 6 *H. L.* 403), Lord Cairns remarks: "I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misrepre-

sentation of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated, makes that which is stated absolutely false."

(3) "Even if the vendor was aware," observes Lord Blackburn, "that the purchaser thought the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor" (*Smith v. Hughes*, L. R., 6 C. P. 597).

Sub-rule 1.—*But when the vendor does something actively to deceive the vendee, as where he endeavours to conceal the defect by some artificial means, or where he makes a false representation, then an action will lie, even though he sell "with all faults."*

(1) The vendor of a house, knowing of a defect in one of the walls plastered it up and papered it over, in consequence whereof the vendee was deceived as to its true condition, and was damaged: Held, that the purchaser could maintain an action of deceit (*Pickering v. Dawson*, 4 Taunt. 785).

(2) Again, where a ship was to be taken "with all faults," and the vendor knew of a latent defect in her, and in order to escape its detection, *concealed it* and made a fraudulent representation of her condition: Held, that an action of deceit would lie (*Schneider v.*

Heath, 3 *Camp.* 506). But, on the other hand, where an article is sold with all faults, it is quite immaterial how many belonged to it within the knowledge of the seller, if he used no artifice to disguise them, and to prevent their being discovered by the purchaser. "The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from all responsibility, am I to be liable, if it be afterwards discovered that the horse was unsound?" (Per Lord Ellenborough, in *Bagshole v. Walters*, 3 *Camp.* 154.)

CHAPTER XII.

OF MAINTENANCE.

Definition. Rule 63.—Maintenance is the officious assistance, by money or otherwise, proffered by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it (*Story on Contract*, sect. 578).

(1) Thus, in the well-known case of *Bradlaugh v. Newdigate* (*L. R.*, 11 *Q. B. D.* 1), the plaintiff, having sat and voted as a member of Parliament without having made and subscribed the oath, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed for so sitting and voting. C. was a person of insufficient means to pay the costs in the event of the action being unsuccessful: Held, that the defendant and C. had no common interest in the result of the action for the penalty, and that the conduct of the defendant in respect of such action amounted to maintenance, for which he was liable to be sued by the plaintiff.

(2) But, on the other hand, as a general rule, there is no doubt that where there is a common interest believed on reasonable grounds to exist, maintenance, under those circumstances, would be justifiable. The oldest authorities all lay down this qualification, and,

by the instances they give, show the sort of interest which is intended. A master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow commoner defending rights of common, a landlord defending his tenant in a suit for tithes, a rich man giving money to a poor man, out of charity, to maintain a right which he would otherwise lose (per *Lord Coleridge, C. J.*, in *Bradlaugh v. Newdigate*, *L. R.*, 11 *Q. B. D.* 11).

(3) And, again, in *Plating Company v. Farquharson* (*L. R.*, 17 *Ch. D.* 49), it was held, that all persons engaged in the trade of plating, had such a common interest in impugning the validity of a patent granted to a person for nickel plating, that they were entitled to subscribe a fund for enabling the defendant, in an action brought by the patentee for infringement of his patent, to appeal against an adverse judgment.

CHAPTER XIII.

OF TRESPASS TO AND CONVERSION OF CHATTELS.

General Rule. RULE 64.—Every direct forcible injury, or act, disturbing the possession of goods without the owner's consent, however slight or temporary the act may be, is a trespass, whether committed by the defendant himself or by some animal belonging to him. And if the trespass amount to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner (as by taking, using, or destroying them), it then becomes a wrongful conversion (*Fouldes v. Willoughby*, 8 M. & W. 540; *Burroughs v. Bayne*, 29 L. J., Ex. 185).

(1) Thus, beating the plaintiff's dogs is a trespass (*Dand v. Sexton*, 3 T. R. 37). And so it was held to be a trespass where the defendant's horse injured the plaintiff's mare, by biting and kicking her (*Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10).

(2) The innocence of the trespasser's intentions is immaterial. Thus, where the sister-in-law of A., immediately after his death, removed some of his jewelry, from a drawer in the room in which he had died, to a cupboard in another, in order to insure its

safety, and the jewelry was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass, in the absence of proof that her interference was reasonably necessary, and was liable for the loss (*Kirk v. Gregory, L. R., 1 Ex. D. 55*).

(3) So, if one lawfully having the goods of another for a particular purpose, destroy them, he is guilty of trespass and conversion (*Cooper v. Willomat, 1 C. B. 692*).

(4) So, if a sheriff sells more goods than are sufficient to satisfy an execution, he will be liable for a conversion of those in excess (*Alfred v. Constable, 6 Q. B. 381*).

(5) So, if A. starts a hare in the ground of B., and hunts it and kills it there, it is a trespass; for so long as the hare is upon B.'s land it is B.'s property (*Sutton v. Moody, 1 Id. Raym. 250*). So, rabbits bred in a warren are the property of the breeder so long as they stay in his land, but not after they have left it (*Hadesden v. Gryssel, Cro. Jac. 195*).

(6) *Conversion by innocent Purchaser.*—The purchaser of a chattel takes it as a general rule, subject to what may turn out to be defects in the title. By a purchase in market overt, however, the title obtained is good as against all the world (except in the case mentioned at the end of this chapter). If not so purchased, though purchased bonâ fide, the title obtained may not be good as against the real owner. But where the original owner has parted with a chattel to A. upon an *actual* contract, though there may be circumstances which enable that owner to set aside that contract, the bonâ fide purchaser

from A. will obtain an indefeasible title, because, until the contract is set aside, A. is in law the owner. The question, therefore, in many such cases will be, was there a contract between the real owner and A.? (*Cundy v. Lindsay*, L. R., 3 App. Ca. 459.) Thus, L. was a manufacturer in Ireland: Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letter used this address, "37, Wood Street, Cheapside," and signed the letters (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name carrying on business in Wood Street. The goods were sent there and the correspondence was all addressed to Blenkiron & Co., 37, Wood Street, and Blenkarn disposed of the goods to the defendant, a bonâ fide purchaser: Held, that no contract was ever made with Blenkarn, and that even a temporary property never passed to him, so that he never obtained such a temporary property which he could pass to the defendant (*Cundy v. Lindsay*, *sup.*).

Exceptions. (1) *Plaintiff's Fault*.—It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act.

Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*Slater v. Swann*, 2 St. 892). So, if his cattle or goods trespassing on my land get injured, he has no remedy (*Turner v. Hunt*, *Brownl.* 220); unless I use an unreasonable

amount of force, as, for instance, by chasing trespassing sheep with a mastiff dog (*King v. Rose*, 1 *Freem.* 347).

So, if a man wrongfully takes my garment and embroiders it with gold, I may retake it; and "if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong" (Coke, C. J., in *Ward v. Eyre*, 2 *Bulstr.* 323). And likewise, if one takes away my carriage, and has it painted anew without my authority, I am entitled to have the carriage without paying for the painting (*Hiscox v. Greenwood*, 4 *Esp.* 174).

(2) *Self-Defence or Defence of Property*.—A trespass committed in self-defence, or defence of property, is justifiable.

Thus, a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner of the property in order to save them, but not otherwise (*Wells v. Head*, 4 *C. & P.* 568).

But a man cannot justify shooting a dog, on the ground that it was chasing animals *feræ naturæ* (*Vere v. Lord Cawdor*, 11 *East*, 569), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*Reade v. Edwards*, 34 *L. J.*, *C. P.* 31).

(3) *In exercise of Right*.—A trespass, committed in exercise of a man's own rights, is justifiable.

Thus, seizing goods of another, under a lawful distress for rent or damage feasant, is lawful.

(4) *Legal Authority*.—Due process of law is a good justification.

Possession. RULE 65.—To maintain an action merely for *trespass* or *conversion*, the plaintiff must be the person in actual or constructive possession of the goods (*Smith v. Miller*, *T. R.* 480). But the person entitled to the reversion of goods may maintain an action for any *permanent* injury done to them (*Tancred v. Allgood*, 28 *L. J.*, *Ex.* 362; *Lancas. Waggon Co. v. Fitzhugh*, 30 *L. J.*, *Ex.* 231; *Mears v. L. & S. W. R. Co.*, 11 *C. B.*, *N. S.* 854).

Possession follows Title. Sub-rule 1.—*A legal right to the possession of personalty draws to it the possession* (*Balme v. Hutton*, 9 *Bing.* 477).

(1) Thus, where the person in temporary possession (as a carrier) delivers my goods to the wrong person, then, as the immediate right to the possession of them becomes again vested in me, so the law immediately invests me with the possession, and I can maintain an action for them against either the bailee or the purchaser (*Cooper v. Willomat*, 1 *C. B.* 672; *Wild v. Pickford*, 8 *M. & W.* 443).

(2) *Sale of Property under Lien.* And so, when, by a sale of goods, the property in them has passed to

the purchaser, subject to a mere lien for the price, the vendor will be liable for conversion if he resells and delivers them to another. But in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*Page v. Edulgee*, *L. R.*, 1 *C. P.* 127; *Martindale v. Smith*, 1 *Q. B.* 389).

(3) And, on the same principle, an administrator may maintain an action for trespass to goods, which trespass was committed previously to his grant of letters of administration (*Thorpe v. Smallwood*, 5 *M. & G.* 760).

(4) So a trustee, having the legal property, may sue in respect of goods, although the actual possession may be in his cestui que trust (*Wooderman v. Baldock*, 8 *Taunt.* 676).

What Possession suffices. Sub-rule 2.—*Any possession is sufficient to sustain an action for trespass or conversion against a wrongdoer.*

Thus, in the leading case of *Armory v. Delamirie* (1 *Sm. L. C.* 315), it was held that the finder of a jewel, could maintain an action against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him; for his possession gave him a good title against all the world except the true owner. (See also *Elliott v. Kempe*, 7 *M. & W.* 312). In short, a defendant cannot set up a *jus tertii* against a person in actual possession. But where the possession of the plaintiff is not actual, but only constructive, the defendant may of course set up a *jus tertii*; for constructive possession depends

upon a good title, and if the title be bad there can be no constructive possession (see *Leake v. Loveday*, 4 *M. & G.* 972).

Joint Owners. RULE 66.—A joint owner can only maintain trespass or conversion against his co-owner, when the latter has done some act inconsistent with the joint-ownership of the plaintiff (2 *Wms. Saund.* 47 *o*; and see *Jacobs v. Senard*, *L. R.*, 5 *H. L.* 464).

(1) Thus, a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby.

(2) But a mere sale of them by one joint owner would not, in general, be a conversion, for he could only sell his share in them. But if he sold them in market overt, so as to vest the whole property in the purchaser, it would be a conversion (*Mayhew v. Her- rick*, 7 *C. B.* 229).

Trespass ab initio. RULE 67.—If one, lawfully taking a chattel, but not absolutely, abuses or wastes it, he renders himself a trespasser ab initio (*Oxley v. Watts*, 1 *T. R.* 12).

Thus, if one find a chattel, it is no trespass to keep it as against all the world except the rightful owner; but if one spoil or damage it, and the rightful owner eventually claim it, then the subsequent damage will revert back, and render the original taking unlawful (*Ibid.*). But, as against the true owner, a man commits no conversion by keeping the goods until he has made due inquiries as to the right of the owner to them (*Vaughan v. Watt*, 6 M. & W. 492; and see *Pillott v. Wilkinson*, 34 L. J., Ex. 22).

Recaption. RULE 68.—When any one has deprived another of his goods or chattels, the owner of the goods may lawfully reclaim and take them, wherever he happens to find them, so it be not in a riotous manner or attended with breach of the peace.

Remedies by Action. By the effect of the Judicature Acts, the distinction in form between actions has been finally abolished, so that the former actions of trespass (which lay for an interference with goods), trover (which lay for a wrongful conversion of goods), and detinue (which lay for a wrongful detainer of goods) no longer exist, although that of

replevin is, at all events in its inception, still different from all other actions. It will, therefore, be convenient to consider the ordinary form of action first, and the action of replevin by itself afterwards.

Ordinary Remedy by Action. RULE 69.—Wherever there has been a trespass, or wrongful conversion, or wrongful detention of a chattel, an action lies, at the suit of the person injured, for damages. And where the defendant still retains the chattel, the court, or a judge, has power to order that execution shall issue for return of the specific chattel detained, without giving the defendant the option of paying the assessed value instead; and if the chattel cannot be found, then, unless the court or judge shall otherwise order, the sheriff shall distrain the defendant by all his goods and chattels in his bailiwick till the defendant renders such chattel (Com. Law Proc. Act, 1854, s. 78).

Replevin. This remedy is, practically speaking, applicable only in cases of goods unlawfully distrained.

RULE 70.—The owner of goods distrained,

is entitled to have them returned upon giving such security as the law requires, to prosecute his suit, without delay, against the distrainer, and to return the goods if a return should be awarded (see 19 & 20 Vict. c. 108, ss. 63—66).

The application for the replevy or return of the goods is made to the registrar of the county court of the district where the distress was made, who thereupon causes their return on the plaintiff's giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course, it is also made a condition of the replevin bond that the rent or damage, in respect of which the distress was made, exceeds 20*l.*, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (19 & 20 Vict. c. 108, s. 95).

Waiver of Tort. **RULE 71.**—When a conversion consists of a wrongful sale of goods, the owner of them may waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff (*Lamine*

v. Dorrell, 2 *L. Raym.* 1216; *Oughton v. Sepplings*, 1 *B. & Ad.* 241; *Notley v. Buck*, 8 *B. & C.* 160). But, by waiving the tort, the plaintiff estops himself from recovering any damages for it (*Brewer v. Sparrow*, 7 *B. & C.* 310).

Stolen Goods. RULE 72.—If any person who has stolen property, or obtained it by false pretences, is prosecuted to conviction by or on behalf of the owner, the property shall be restored to the owner, and the court before whom such person shall be tried shall have power to order restitution thereof (24 & 25 Vict. c. 96, s. 100).

Therefore, even if the goods were sold by the thief in market overt (which at common law gives an indefeasible title to the purchaser), yet, by this section, they must be given up to the original owner. And where no order is made under the act, yet the act revests the goods, and gives the owner a right of action for them (*Scattergood v. Silvester*, 19 *L. J., Q. B.* 447).

But, where an actual contract for the sale of goods is obtained by a false pretence, and the goods are delivered under the contract, and are subsequently sold by the offender to an innocent third party, the

latter acquires a good title. For although the *contract* was obtained by a false pretence, yet the goods passed under it to the offender with the knowledge of the true owner, and the innocent purchaser will not be allowed to suffer (see *Moyce v. Newington*, *L. R.*, 4 *Q. B. D.* 32, and *Badcock v. Lawson*, *ib.* 394).

Limitation. RULE 73.—All actions for trespass to, or conversion, or detainer of goods and chattels, must be commenced within six years next after the cause of action arose.

CHAPTER XIV.

OF INFRINGEMENTS OF TRADE MARKS AND PATENT
RIGHT AND COPYRIGHT.

ALTHOUGH the subject of trade marks, patent right, and copyright forms a separate group, practically standing apart from ordinary torts, and looked upon as a specialty to which a few practitioners wholly devote themselves, yet, strictly speaking, infringements of these rights are torts, and, as such, demand some notice (necessarily very elementary) to be taken of them, even in a small work like this.

SECTION 1.

Infringement of Trade Marks and Trade Names.

Definition. RULE 74.—(1) A trade *mark* is the symbol by which a man causes his goods or wares to be identified and known in the market, and must now consist of one or more of the following essential particulars, namely :—

(a) The name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or

(b) A written signature or copy of a written signature of an individual or firm, or a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use, but not a *single* letter (*Re Mitchell, L. R.*, 7 *Ch. Div.* 36) nor a combination of letters (*Exp. Stephens, L. R.*, 3 *Ch. Div.* 659);

(c) A combination of any one or more of the above with any letters, words or figures, or combination of letters, words or figures; or

(d) Any special and distinctive word or words, or combination of figures or letters used as a trade mark previously to the 13th August, 1875 (46 & 47 Vict. c. 57, s. 64).

(2) A trade *name* is the name under which an individual or firm sell their goods, or a name, not merely descriptive, given by an individual to an article which, although previously known to exist, is new as an article of commerce, and which has become identified in the market with the goods sold by that individual, and not merely with the article itself.

Nature of the Title to Relief. Whether the relief in the case of infringements of trade *mark* is

founded upon a right of property in the mark, or on fraudulent misrepresentation, is by no means so clear as could be desired. It would seem that the tendency of the older cases was to hold that the jurisdiction was founded on fraud; but in the case of *The American Cloth Co. v. American Leather Cloth Co.* (33 *L. J.*, *Ch.* 199), Lord Westbury said, "The true principle seems to be that the jurisdiction of the court in the protection given to trade marks is founded upon property," not of course property in the symbol itself, but in the sole application of the symbol to the particular class of goods of which it constituted the trade mark; and this view was followed in *Millington v. Fox* (3 *M. & C.* 338), and in *Harrison v. Taylor* (11 *Jur.*, *N. S.* 408). On the other hand, in *The Singer Machine Manufacturers v. Wilson* (*L. R.*, 2 *Ch. D.* 434), the Master of the Rolls scouted the idea of there being any property in the trade mark, and founded the jurisdiction wholly upon deception. This view was supported by the court of appeal (*L. R.*, 2 *Ch. D.* 451), but upon the case being brought before the House of Lords (*L. R.*, 3 *App. Cas.* 376), Lord Cairns said, "That there have been many cases in which a trade mark has been used, not merely improperly but fraudulently, and that this fraudulent use has often been adverted to and made the ground of the decision, I do not doubt; but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. . . . The action of the court must depend upon the right of the plaintiff and the injury done to

that right. What the motive of the defendant may be, the court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them, and perseveres in infringing upon them, as culpable as if he had originally known them." Lord Blackburn, however, was more guarded in his language, and said, "I prefer to say no more, than that I am not as yet prepared to assent, either to the position that there is a right of property in a name, or, what seems to me nearly the same thing, to assent to its full extent, to the proposition, that it is not necessary to prove fraud." It is, therefore, somewhat difficult to see upon what ground the court gives relief, but it is humbly suggested, that, as distinguished from an actual property in a trade mark, there is a negative property or right of preventing any other person from using it in such a manner as to cause a probability of such latter person's goods being mistaken for those of the person who has used the trade mark, but that such wrongful user, without fraud, is no ground for obtaining damages. Whether, however, this is the true reason or not, it seems to be well established that,—

RULE 75.—(1) Where a person has a definite mark or name, he is entitled to an injunction to restrain any other person from using any mark or name so similar as either actually to have deceived, or such as obviously might deceive, the public, although there

might be no intention to deceive (see per Lord Cairns in *Singer Machine Manufacturers v. Wilson*, *sup.*, and per Vice-Chancellor Wood in *Welch v. Knott*, 4 K. & J. 747). But he will not be liable to an action for damages, or (query) to render an account of his profits, unless he has acted fraudulently (see per Lord Blackburn in *Singer Manufacturers v. Wilson*, *sup.*).

(2) The question whether a name applied to a patented or other article constitutes a trade name, indicating the manufacturer, or has come to be regarded as the proper designation of the article itself, and therefore open to the whole world, is a question of evidence in each particular case (see per Lord Cairns, L. C., *Singer Machine Co. v. Wilson*, L. R., 3 App. Ca., at p. 385).

(1) Thus, in *Harrison v. Taylor* (*sup.*), the plaintiff had adopted, as his trade mark, the figure of an ox, on the flank of which was printed the word "Durham," the names of the plaintiff being printed above the word "Durham," and the word "mustard," below. The defendants, who were also mustard manufacturers, used a similar ox, but without the words "Durham" and "mustard," but having his name Taylor printed below. The fact of the plaintiff's mark being well known throughout the trade having been proved, the Court held, that the defendant's

mark was so similar as to be likely to deceive intending purchasers; and, although the defendant did not know that he had infringed the plaintiff's mark, an injunction was granted to restrain him from further using it.

(2) So, in *Cocks v. Chandler* (*L. R.*, 11 *Eq.* 446), where the inventor of a sauce sold it in wrappers, whereon it was called "The Original Reading Sauce," and the defendant brought out a sauce which he labelled "Chandler's Original Reading Sauce," he was restrained from doing so for the future (and see *Braham v. Beacham*, *L. R.*, 7 *Ch. Div.* 848; and *Boulnois v. Peate*, *L. R.*, 13 *Ch. Div.* 513, *n.*).

(3) So, where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation in the market by a name, *not merely descriptive* of the article, B. will not be permitted to sell a similar article under the same name (*Braham v. Bustard*, 1 *H. & M.* 449). But where the inventor of a *new* substance, or a new machine, has given it a name, and having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance or machine by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent, for the name has in such a case become merely the name of the article, and not the badge of the maker, of it (*Linoleum Co. v. Nairn*, *L. R.*, 7 *Ch. Div.* 834; *Chcarin v. Walker*, *L. R.*, 5 *Ch. Div.* 850; and see *Singer Manufacturing Co. v. Loog*, *L. R.*, 8 *App. Ca.* 14).

(4) In *McAndrew v. Bassett* (33 L. J., Ch. 561), the plaintiffs had manufactured liquorice which they stamped with the word "Anatolia;" and it was held, that, though this was but the name of a place, yet a property in it could be acquired when it had been notoriously applied to a vendible commodity sold only by a particular firm (and see also *Seigert v. Findlater*, L. R., 7 Ch. Div. 801).

(5) And so where the omnibuses of an omnibus proprietor were marked with particular figures and devices, an injunction was granted to restrain an opposition omnibus proprietor from adopting similar figures and devices (*Knott v. Morgan*, 2 Keen, 219).

Assignment of. Sub-rule.—*Although a trader may have a property in a trade mark, sufficient to give him a right to exclude all others from using it, if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he will not be allowed to assign it; for that would be a fraud upon the public (Leather Cloth Co. v. American Leather Cloth Co., 1 H. & M. 271). But if the increased value of the goods is not dependent upon such personal merits, the trade mark is assignable (Bury v. Bedford, 33 L. J., Ch. 465).*

Exception. Selling Articles under Vendor's own Name.—Where a person sells an article with his own name attached, and another person of the same name sells a like article with his name attached, an injunction will not be granted to prevent such last-named person from doing so, unless it appears to the Court that he does it with the fraudulent intention of palm-

ing his goods upon the public, as being those of the plaintiff (*Burgess v. Burgess*, 22 *L. J.*, *Ch.* 675 ; *Sykes v. Sykes*, 3 *B. & C.* 541 ; *Massam v. Thorley's Food Co.*, *L. R.*, 14 *Ch. Div.* 748). But if a fraudulent intention is proved, or appears by necessary implication, an injunction will be granted. For instance, where two persons, one named Day and the other Martin, recently set up a blacking shop, and advertised their goods as "Day and Martin's," Mr. Justice Chitty granted an injunction, on the ground that it was a plain attempt to hoodwink the public into the belief that they were selling the blacking of the well-known manufacturers of blacking.

Registration.—Rule 76.—No person can institute a suit to prevent the infringement of any trade *mark*, until and unless such mark is registered in the register of trade marks. Registration is *primâ facie* evidence of the right to the trade mark, and after five years is conclusive evidence (46 & 47 Vict. c. 57, ss. 76, 77). But this rule does not apply to actions for preventing the infringement of a trade *name*.

SECTION 2.

Infringement of Patent Right.

Definition of Patent Right. RULE 77.—A patent right is a privilege granted by the Crown (by letters patent) to the first inventor of any new manufacture or invention, that he and his licensees shall have the sole right, during the term of fourteen years, of making and vending such manufacture or invention.

It is, however, not intended in this work to give any account of the mode of getting a grant of letters patent. The following summary of the law is based, in fact, on the assumption that letters patent have been granted.

RULE 78.—Letters patent are void and of no effect if one or more of the five following conditions are absent, viz.: (1) the subject of the patent must be a manufacture; (2) it must be a new invention; (3) the patentee or one of the patentees (where there are more than one) must be the true and first inventor; (4) the subject of the patent must be of general public utility; (5) a complete specification (*i. e.*, a sufficient description of the nature of the invention and the mode of carrying it into effect, so as to enable ordinarily skilful

persons to practise and use it at the end of the term for which the patent is granted) must be filed within nine months from the date of the application for the patent (see 21 Jac. 1, c. 3; 15 & 16 Vict. c. 83, s. 27; 46 & 47 Vict. c. 57, ss. 5 *et seq.*).

I. What is a Manufacture. A manufacture, according to the derivation of the word, means some article made by hand; but this is hardly the sense in which it is used in the rule.

Sub-rule 1.—“*The word manufacture denotes either a thing made which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously-known article, or some other useful purpose; or a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substances, but in a cheaper or more expeditious manner, or of a better and more useful kind*” (Abbott, C. J., *R. v. Wheeler*, 2 B. & Al. 349; *Crane v. Price*, 4 M. & G. 580).

Thus, a patent for the omission merely of one or more of several parts of a process, whereby the process may be more cheaply and expeditiously performed, is valid (*Russell v. Cowley*, 1 Webst. R. 464); or for an improvement in one or more of several parts of a whole (*Clarke v. Adie*, L. R., 2 App. Ca. 315).

II. Newness of Manufacture. Sub-rule 2.—

The prior knowledge of an invention to avoid a patent must be such knowledge as will enable the British public to perceive the very discovery and to carry the invention into practical use (Hill v. Evans, 4 D., F. & J. 288).

(1) Thus, a new combination of purely old elements is a novel invention, because the public could not have perceived the combination from the separate parts (*Harrison v. Anderston Co., L. R., 1 App. Ca. 574*).

(2) On the other hand, the mere application of a known instrument to purposes so analogous to those to which it has been previously applied as to at once suggest the application, is no ground for a patent (*Harwood v. G. N. R. Co., 2 B. & S. 194*, and *11 H. L. C. 654*). So, where there was a known invention for dressing cotton and linen yarns by machinery, and a subsequent patent was procured for finishing yarns of wool and hair, the process being the same as in the first invention for cotton and linen, the patent was held void (*Brook v. Aston, 32 L. J. Ch. 341*, and *Patent Bottle Co. v. Seymour, 5 C. B., N. S. 164*; but compare *Dangerfield v. Jones, 13 L. T., N. S. 142*, and *Young v. Fernie, 4 Giff. 577*).

(3) Again, where crinolines were made of whalebone suspended by tapes, and an inventor claimed a patent for crinolines of exactly similar construction, with the single substitution of steel watch-springs for whalebone, it was held that there was not sufficient novelty; (and see *Thorn v. Worthing Co., L. R., 6 Ch. Div. 415 n.*).

(4) If the article be new in this realm, but not new

elsewhere, it is yet the subject for a valid patent; for the object of letters patent is to give a species of premium for improving the manufactures, not so much of the world, as of the United Kingdom (*Beard v. Egerton*, 3 C. B. 97).

Inference of Novelty. Sub-rule 3.—*If there is great utility proved, novelty will be inferred, unless the facts render such inference impossible* (*Crane v. Price*, 1 Webst. Pat. Ca. 393; *Young v. Fernie*, 4 Giff. 577).

III. Meaning of true and first Inventor. Sub-rule 4.—*If the invention has been communicated to the patentee by a person in this country, he cannot claim to be the true and first inventor; but if he has acquired the knowledge of the invention abroad, and introduces it here, the law looks upon him as the true and first inventor* (*Lewis v. Marling*, 10 B. & C. 22; *Marsden v. Saville St. Co., L. R.*, 3 Ex. D. 203).

And so if the invention has been discovered before, but kept secret by the inventor, it does not render the patent of a subsequent inventor of it invalid; for it is new so far as the public are concerned (*Carpenter v. Smith*, 1 Webst. R. 534, per Lord Abinger).

IV. General Public Utility. Sub-rule 5.—*The community at large must receive some benefit from the invention.*

The reason of this condition is obvious, for an useless invention not only does not merit the premium of

a monopoly, but what is worse, prevents other inventors from improving upon it.

Thus, if one produces old articles in a new manner, such new way must, in some way, be superior to the old method, in order to support a patent; for otherwise the old method is as good as the new; but the Court construes such an invention very strictly, as it looks jealously at the claims of inventors seeking to limit the rights of the public in affecting a well-known object (*Curtis v. Platt*, L. R., 3 Ch. D. 135, *n.*).

And if the article is produced at a cheaper rate by the new machine, or in a superior style, it is a good ground for a patent.

V. Specification. As the object of letters patent is to give the benefit of an invention to the public at large, instead of allowing it to remain a secret in the hands of the inventor; it follows that the nature of the invention must be declared by the inventor.

Sub-rule 6.—*If the specification (as the description is called) be ambiguous, insufficient or misleading, it will render the patent void* (*Simpson v. Holliday*, L. R., 1 H. L. 315; *Savory v. Price*, Ry. & Mo. 1; and *Hinks v. Safety Lighting Co.*, L. R., 4 Ch. Div. 607), *unless the ambiguity, variation or imperfection be slight and immaterial* (*Gibbs v. Cole*, 3 P. Wms. 255). A patentee may, however, from time to time, obtain leave to amend his specification, so long as such amendment does

not make the invention substantially larger than, or substantially different from, the invention as originally specified. Such leave, however, cannot be obtained after the commencement of any legal proceeding in relation to the patent (46 & 47 Vict. c. 57, s. 18).

Sub-rule 7.—*If an objection be sustained against any one or more of several inventions included in the same patent, the entire patent is void. Provided that a patentee may obtain leave from the Patent Office, before the commencement of any legal proceeding, to disclaim any invention or part of an invention included in the specification; and may, even after the commencement of any legal proceeding, obtain leave to make such disclaimer from the Court or the judge before which or whom such proceeding may be pending, subject to such terms as such Court or judge may impose as to costs or otherwise (46 & 47 Vict. c. 57, ss. 18, 19).*

Infringement. Rule 79.—A person infringes a patent right by using, exercising, or vending it within this realm.

(1) Thus, the captain of a vessel, fitted with pumps, which were an infringement of the plaintiff's patent, was held liable, although he was not owner of the vessel (*Adair v. Young*, L. R., 12 Ch. Div. 13).

(2) So, where a patent had been granted in England for a new process for producing more cheaply a product previously known, the importation of that

product made abroad by *the patented* process was held to be an infringement (*Van Heyden v. Neustadt*, L. R., 14 Ch. Div. 203).

Exceptions.—1. It would seem that when articles, which are the subject of a patent, are made without a licence from the patentee, simply for the purpose of bonâ fide experiments, those who make them are not liable, unless they are made and used for profit, or with the object of obtaining profit, however limited (*Frearson v. Lee*, L. R., 9 Ch. Div. 48).

2. Where a specification has been amended by disclaimer or otherwise, no damages will be given in any action for infringement committed before the amendment was made, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill (46 & 47 Vict. c. 57, s. 20).

Such is a very slight sketch of the elements of the law relating to patents. Let us now pass on to the law of copyright.

SECTION 3.

Of Infringements of Copyright.

RULE 80.—Literary property can be invaded in three ways, viz.:—(1) Where one publishes an unauthorized edition of a work in this kingdom in which copyright exists, or introduces and sells a foreign reprint of such a work. (2) Where a man pretending

to be the author of a book illegitimately appropriates the fruit of a previous author's labours. (3) Where a man fraudulently sells a work under the name or title of another man, or another's work (per James, L. J., *Dicks v. Yates*, L. R., 18 Ch. D. 90).

The last is not an invasion of copyright, but a common law fraud, and, accordingly, will not be treated of in this chapter, which relates exclusively to infringements of copyright.

Definition. RULE 81.—Copyright is the exclusive right which an author possesses of multiplying copies of his own work.

It seems to be doubtful whether copyright existed at common law, but, however that may be, it is *now* positively defined and settled by statute.

RULE 82.—(1) The copyright in a book published in the author's lifetime belongs to the author and his assigns during the life of the author, and seven years after his death. If, however, such period expires before the end of forty-two years from the first publication of such book, the copyright in that case endures for such period of forty-two years (5 & 6 Vict. c. 45, s. 3).

(2) The copyright in a work published

subsequently to the author's death, belongs to the proprietor of the manuscript for the term of forty-two years from the first publication (*Ibid.*).

(3) The proprietor of a copyright cannot sue or proceed for any infringement of his copyright before making an entry of it at Stationers' Hall (*Ibid.* sect. 11).

Exception. Immoral Works.—There is no copyright in libellous, fraudulent, or immoral works (*Stockdale v. Onychyn*, 5 B. & C. 173; *Southey v. Sherwood*, 2 Mer. 435).

So, where a work professes to be the work of a person other than the real author, with the object thereby to induce the public to pay a higher price for it, no copyright can be claimed in it (*Wright v. Tallis*, 1 C. B. 893).

Meaning of Book. Sub-rule.—*The word book includes every volume, part and division of a volume, pamphlet, sheet of letter-press, sheet of music, chart, map, or plan separately published* (sect. 2, and see *Henderson v. Maxwell*, L. R., 5 Ch. Div. 892).

(1) Thus, there may be copyright in the wood engravings of a work, for they are part of the volume (*Bogue v. Houlston*, 5 De G. & Sm. 267).

(2) An illustrated catalogue of articles of furniture published as an advertisement by upholsterers, and not for sale, may be the subject of copyright (*Maple & Co. v. Junior Army and Navy Stores*, L. R., 21 Ch. D. 369).

(3) So also copyright may subsist in part of a work, although the rest may not be entitled to it (*Low v. Wood*, *L. R.*, 6 *Eq.* 415).

(4) Again, a newspaper is within the Copyright Act, and requires registration in order to give the proprietor copyright in its contents; and in order that the proprietor of the paper may become the proprietor of the copyright in an article he must show that he paid the writer for the copyright (*Walter v. Howe*, *L. R.*, 17 *Ch. D.* 708).

(5) But it seems that copyright is not claimable in a single word, as the title of a magazine; “Belgravia” for instance (*Maxwell v. Hogg*, *L. R.*, 2 *Ch.* 207); nor, as a general rule, in the title of a book (*Dicks v. Yates*, *L. R.*, 18 *Ch. D.* 76). It seems, however, clear that the publication of a magazine or book under the title of another existing one might be a common law fraud.

What is Piracy of Copyright. RULE

—The act that secures copyright to authors, guards against the piracy of the words and sentiments, but it does not prohibit writing on the same subject (per Mansfield, C. J., *Sayre v. Moore*, 1 *East*, 359).

(1) Thus, in the above case, Lord Mansfield further directed the jury, that the question for them was, “whether the alteration be colourable or not; there must be such a similitude as to make it probable and reasonable to suppose that one is a tran-

script, and nothing more than a transcript. In the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly here, any more than in other instances; but upon any question of this kind, the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected, even in a small degree, so that it thereby becomes more serviceable and useful."

(2) And even where a great part of the plaintiff's work has been taken into the defendant's, it is no infringement, so long as the defendant has so carefully revised and corrected it, as to produce an original result (*Spiers v. Browne*, 6 W. R. 352, and consider *Dicks v. Brooks*, L. R., 15 Ch. Div. 22); or, if it was fairly done with a view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter (per Ellenborough, C. J., *Cary v. Kearsley*, 4 Esp. 170).

(3) The part taken by the defendant must be substantial and material to enable the plaintiff to sustain an action (*Chatterton v. Care*, L. R., 3 App. Ca. 483).

Honest Intention no Excuse. Sub-rule.—*If, in effect, the great bulk of the plaintiff's publication—a large and vital part of his labour—has been appropriated, and published in a form that will materially injure his copyright; mere honest intention on*

the part of the appropriator will not suffice (per Wood, V.-C., *Scott v. Stanford*, L. R., 3 Eq. 723).

What is Piracy of Music. Thus, with respect to music, if the whole air be taken it is a piracy, although set to a different accompaniment, or even with variations; for the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same substantially; the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear (*D'Almaine v. Boosey*, 1 Y. & C., Ex. 288, per Lyndhurst). But, on the other hand, where one composed and published an opera in full score, and after his death B. arranged the whole opera for the piano, it was held that this was an independent musical composition, and no piracy (*Wood v. Boosey*, L. R., 3 Q. B. (Ex. Ch.) 223).

Plays founded on Novels. To produce the incidents of a novel in the form of a play, is no infringement of copyright, unless the play be printed, or unless the novel was founded on a play, of the copyright of which the author was owner (see *Reade v. Conquest*, 30 L. J., C. P. 209; *Tinsley v. Lacy*, 32 L. J., Ch. 535; and *Reade v. Lacy*, 30 L. J., Ch. 655).

Remedies. RULE 84.—Any person causing a book to be printed for sale or exportation, without the written consent of the proprietor of the copyright; or who imports for sale such unlawfully printed book; or with a guilty knowledge sells, publishes, or exposes for sale or hire, or has in his possession for sale or hire, any such book without the consent of the proprietor, shall be liable to an action at the suit of the proprietor, to be brought within twelve calendar months. And an injunction may be also obtained, to restrain the further infringement.

(1) Thus, an injunction may be granted to restrain a person from printing the unpublished works of another (*Prince Albert v. Strange*, 1 Mac. & Gor. 25). And an action at law may also be maintained for the same cause (*Mayall v. Higby*, 6 L. T., N. S. 362).

(2) An injunction will also be granted, if a person under colour of writing a review copies out so large and important a portion of the work as to interfere with the sale of it: but a reasonable amount of quotation, in order to review the work properly, is allowable (*Campbell v. Scott*, 11 Sim. 31; *Bell v. Walker*, 1 Bro. Ch. C. 450).

Penalties. Besides the remedy by action and injunction, there is also a quasi-criminal remedy in the case of *imported* piracies, by means of penalties.

These do not take away the remedy by action or injunction, but are cumulative upon them (sect. 17).

Copyright in Oral Lectures, Dramas, and Works of Art. Besides the copyright in literary works, there is also a copyright in various other productions.

Such are oral lectures, dramatic compositions, engravings, prints, lithographs, drawings, paintings, photographs, and sculptures and models. In a work like the present, space will not permit me to do anything more than sketch out the main heads of the rights of individuals in respect of these productions.

The publication of oral lectures, except those delivered in colleges, &c., is prohibited by 5 & 6 Will. 4, c. 65, without the author's consent ; but in order to have the benefit of this act, the lecturer must give previous notice to two justices of the peace.

Right of Representation of Dramatic and Musical Works. The right of publicly *representing* dramatic and musical compositions, *first produced in this realm* (*Boucicault v. Chatterton, L. R., 5 Ch. Div. 267*), is vested in the author or composer, and he assigns, for the same period as in literary compositions, by 5 & 6 Vict. c. 45, s. 20, which also imposes penalties upon any person performing them without the written leave of the author or composer. These penalties are not cumulative, but only alter-

native. As to what is a public representation see *Wall v. Taylor* (*L. R.*, 11 *Q. B. D.* 102), and *Duck v. Bates* (*L. R.*, 12 *Q. B. D.* 79; affirmed on appeal and probably reported in *L. R.*, 13 *Q. B. D.*).

Assignment of Copyright does not include Right of Representation. I may mention, that the assignment of the copyright of a book containing dramatic or musical compositions is only an assignment of the right of multiplying copies of it, and not of the right of representing it (sect. 22), unless at the time of registering the assignment the same is expressly stated. But a mere assignment of the right of representation does not seem to require registration (*Lacy v. Rhys*, 22 *L. J.*, *Q. B.* 157). Similarly, the publication, in this country, of a dramatic piece, or musical composition, as a book, before it has been publicly represented or performed, does not deprive the author or his assignee of the exclusive right of performing or representing it (*Chappell v. Boosey*, *L. R.*, 2 *Ch. D.* 232).

Engravings. Engravings are protected by the statutes 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; and 17 Geo. 3, c. 57.

Sculpture. Sculptures and models by 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56.

Designs. Useful and ornamental designs are protected by "The Patents, Designs, and Trade Marks Act, 1883."

Works of Art. Paintings, drawings and photographs by 25 & 26 Vict. c. 68. (As to the latter see *Nottage v. Jackson*, *L. R.*, 11 *Q. B. D.* 627.)

Conclusion. Here this summary statement of the law relating to torts must conclude. The student, must not, however, imagine that such injuries as are not named in this or any other treatise are therefore not remediable by the law, for wrongs are infinitely various. Let him in such cases recollect the observation of Cicero, “*Erat enim ratio profecta a rerum naturâ, et ad recte faciendum impellens, et a delicto avocans: quæ non tum denique incipit lex esse cum scripta est, sed tum, cum orta est.*”

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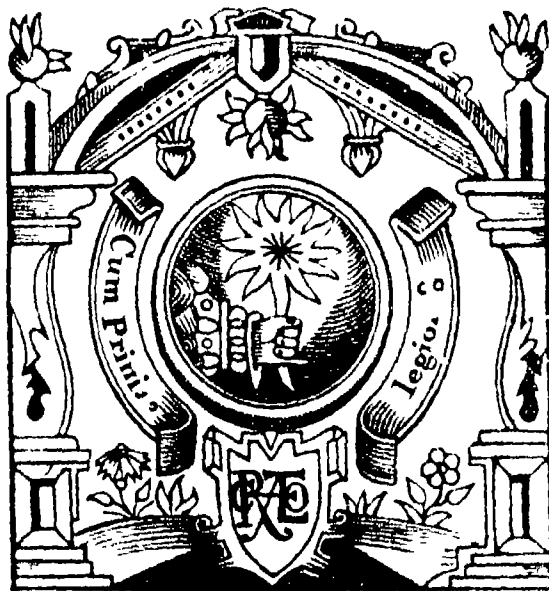
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